FILE COPY

No. 838

JAMES R. BROWN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

WILLIE [illegible], *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, MASSACHUSETTS BAY TELECASTERS, INC., AND GREATER BOSTON TELEVISION CORPORATION, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, WHDH, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case.

OPINIONS BELOW

The opinion of the Court below is reported 104 App. D.C. 226, 261 F. 2d 55. Its order vacating respondent Federal Communications Commission's order on appeal (Appendix, p. 124a) has not yet been officially reported.[1]

JURISDICTION

The order of the Court of Appeals vacating the order of respondent Commission on appeal was entered on January 19, 1961. An order denying petition for rehearing was entered on February 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

QUESTIONS PRESENTED

I. Whether the court below, in an appeal taken pursuant to 47 U.S.C. 402(b) from a decision and order of the Commission granting Petitioner a construction permit for a television station had power to vacate such order solely on an *ex parte* approval of contested "findings" and a "recommendation thereon", purportedly based by the Commission upon a supplementary record made subsequent to the appeal, which approval was given not only without affording any hearing to Petitioner but also without reviewing any portion of such supplementary record.

II. Whether 5 U.S.C. 1037(c), made applicable by its express terms to appeals taken under 47 U.S.C.

[1] Because of the bulk of the material required to be printed in the Appendix to this Petition, it has been separately printed as provided by this Court's Rule 23(i). References to material in the Appendix will be indicated by the symbol, A, followed by the page number, e.g. (A. 124a).

402(a) is applicable by implication to appeals taken under 47 U.S.C. 402(b) and, if so, the extent to which the court may supervise the proceedings before the Commission on a remand thereunder, and whether the court may arbitrarily refuse to hear and determine the case on the record as supplemented.

III. Whether the court below after (a) holding that the record on appeal required affirmance of the Commission, and (b) approving a Commission determination on the supplementary record that neither the original appeal record nor the Commission's decision thereon was tainted by any improper influence, had power to vacate the Commission's order on appeal so that the Commission may reexamine and reevaluate the very same findings and conclusions which the court had found required affirmance.

STATUTES INVOLVED

The relevant provisions of the Communications Act of 1934, as amended, 47 U.S.C. 151, *et seq.*, the administrative Procedure Act of 1946, 60 Stat. 243, 5 U.S.C. 1009, and of the Judicial Review Act of 1950, 5 U.S.C. 1037(c), are set forth on pages 19 to 23 hereof, following the petition herein.

STATEMENT

These cases came before the court below on appeals from a Decision and Order of the Commission released April 25, 1957 (Joint Appendix filed in court below, pp. 560-736), awarding VHF television channel 5 in Boston to Petitioner (WHDH) and denying the mutually exclusive applications of Respondents Massachusetts Bay Telecasters, Inc. (MBT) and Greater

Boston Television Corporation (GBT) therefor. On July 31, 1958, the court below issued its Opinion and Order (A. 1a) deciding all of the matters raised by said Respondents on appeal, holding that the Commission in granting Petitioner's application had acted in the public interest and that its findings and conclusions had substantial support on the whole record then before it.[2] It stated (A. 19a):

> "Accordingly, and without more, we would now be bound to affirm. We thus rule definitively so that repose may enfold this litigation if the steps next to be prescribed shall disclose no vitiating developments.[29]
>
> [29] We cannot know what may be the state of the record after the hearing we are ordering. *Fleming* v. *FCC*, 225 F. 2d 523, 526 (1955); cf *U. S.* v. *Shotwell Manufacturing Company*, 355 U.S. 233, 241, *et seq.* (1957)"

The court then proceeded (Part VI of its Opinion, A. 20a-24a) to recite that certain testimony in hearings conducted by the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce which had been filed with (a different panel of) the court below in connection with another case[3] contained testimony by former Chairman McConnaughey of the Commission to the effect that while the applications of Petitioner and Respondents were pending before the Commission, he had talked with individuals connected with some of the parties (Robert Choate of Petitioner and Forrester Clark of MBT) and with certain representatives of the Boston

[2] The comparative proceedings before the Commission on the competing applications of WHDH, MBT and GBT are detailed in the opinion (A. 1a-19a).

[3] *WKAT* v. *FCC*, 103 App. D.C. 324, 258 F. 2d, 419.

Globe newspapers, a competitor of Petitioner's parent, The Boston Herald-Traveller Corporation. The court indicated that the passing references to these matters in Mr. McConnaughey's testimony before the House Legislative Oversight Committee raised, but did not answer, serious questions and that a proper investigation of these matters was required. The court directed the Commission to hold an evidentiary hearing on specified issues going to the "possibility" that the award to Petitioner might be void *ab initio*, or voidable and that a party or various parties "might be disqualified by reason of misconduct to receive an award of a television permit" (A. 22a).

The remand order provided in detail for the conduct of the proceedings before the Commission and for "progress" reports to be submitted for the court's approval. (A. 26a). The court also provided, ". . . that the status quo is to be maintained, and that we retain jurisdiction of these appeals pending receipt of the findings and final report of the Commission." (A. 23a)

The opinion concluded (A. 24a):

> "We will expect the progress report in due course as indicated, and ultimately in the light of developments, such findings as to the issues defined in this Part VI as may supplement the record upon which this appeal has so far been based."[4]

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[4] The Commission, pursuant to this and subsequent orders of the court (Appendix, pps. 25a, 31a, 32a, 37a, 38a and 91a), filed seven "progress" reports with the court (Appendix, pps. 29a, 31a, 33a, 37a, 70a, 86a and 97a).

The Commission in December, 1958, with approval of the court, appointed the Honorable Horace Stern, former Chief Justice of the Supreme Court of Pennsylvania, as Special Hearing Examiner, and ordered an evidentiary hearing upon the issues specified by the court. Judge Stern held an extensive investigatory hearing and on September 23, 1959, issued his Initial Decision (A. 39a-65a).

Judge Stern's ultimate findings of fact included the following (R. 64a):

> "1. None of the parties who were applicants for the grant of a construction permit for Channel 5, Boston, improperly influenced, or (with the exception of Massachusetts Bay Telecasters to the somewhat minor extent discussed in the foregoing opinion) attempted to influence Chairman McConnaughey or any other member of the Federal Communications Commission in private interviews or otherwise and not by the recognized and public processes of adjudication, in order to induce him or any of them to favor their own applications in the final decision."

Judge Stern's conclusions included the following (A. 65a):

> "3. The award of the construction permit for Channel 5 in Boston made in the said proceedings is neither void *ab initio* nor voidable because of any facts herein found."[5]

---

[5] Judge Stern's basic findings with respect to Mr. Choate, the only representative of Petitioner involved, included the categorical and unqualified determinations:

> "That Choate made no representation at either luncheon as to the calibre of his people, nor attempted in any way to 'impress' McConnaughey." (A. 46a)
>
> "From all of the testimony, therefore, the Examiner finds that neither at his luncheon meetings with Chairman McCon-

The Commission in its Decision and Order of July 14, 1960 (A. 71a-86a), which the court below found in other respects to be in derogation of the court's order (A. 114a), reached a different conclusion than did Judge Stern. As the Commission's July 14th Decision and Order reveals, its contrary conclusions adverse to Petitioner are not predicated upon any evidence in the remand record. The Commission stated in paragraph 6 of its July 14th Decision (A. 75a), "However, as hereinafter noted, while we accept the honesty of the testimony as far as it went, we do not believe that all of the witnesses fully disclosed their actions and motives." On the premise that Mr. Choate had not fully disclosed his "actions and motives", the Commission based its conclusions on assumed undisclosed facts and motives. All of its determinations adverse to Petitioner fall into this category.

On August 15, 1960, Petitioner filed a petition (attachment to R. 998*) for rehearing with the Com-

naughey nor on any other occasion did Choate make any culpable attempt to influence his vote in the Channel 5 proceedings nor did in fact exert any such influence. . . . Nor was there anything secret or sinister merely in the holding of these brief luncheon meetings, the real question being, of course, the nature and content of the conversations which occurred there, and as to that it must once again be repeated for it goes to the very heart of the present issues that there is not a shred of credible evidence that there was any attempt there on the part of Choate to present the merits of the Herald application, the qualifications of the Herald organization, or anything in derogation of the other applicants,— in short, nothing that either in law or codes of professional or judicial ethics could justifiably be regarded as impairing the validity or propriety of the award which was subsequently made by the Commission." (A. 50a, 51a)

*References to material in the certified record will be indicated by the symbol R., followed by a page number, e.g. (R. 998).

mission requesting a reconsidertion of its July 14th Decision, on the ground that said decision violated the court's remand order; that its determinations adverse to WHDH had no record foundation; that the Commission had violated the court's injunction to make findings on certain specified issues by failing to make required record findings adverse to Respondents MBT and GBT; and, that the Commission's purported action in vacating Petitioner's award, apart from being a violation of the court's order, was an abuse of the Commission's discretion from a procedural standpoint. Petitioner also requested the Commission to stay its July 14th Order until it had disposed of said petition (R. 994). The Commission denied the request for stay by order released September 16, 1960 (A. 88a-91a) and the petition for rehearing by order released on November 1, 1960 (A. 94a-96a).

Petitioner, on September 16, 1960, filed a petition (R. 979) with the court below requesting, *inter alia*, that the court direct the Commission promptly upon disposing of Petitioner's petition for reconsideration to certify its order thereon and the record made in the remand proceedings to the court. Petitioner further requested therein that the court order the parties to file briefs and thereafter hold argument at the court's earliest convenience on the issues of whether the evidentiary remand record afforded any basis for the court to withhold the affirmance of the Commission's April 25, 1957, award to Petitioner. Various pleadings relating to this petition were filed (R. 1065, 1076, 1082 and 1095) but no order on it was entered.

On October 7, 1960 (A. 114a) the court below on its own motion entered an order staying further Commission proceedings and directing the Commission within

thirty days to file its final report, as originally directed by the court's order of July 28, 1958.

A petition to intervene as *amicus curiae* was filed on behalf of the United States, and granted by order of the court below dated October 14 (A. 117a). The order provided that the United States be allowed to participate as an *amicus curiae*, to file briefs and to participate in oral argument.[7]

Thereafter, under date of November 7, 1960, the Commission transmitted to the court its four-page "Report and Recommendation", (corrected by leave of the Court on December 21, 1960, R. 1148) purporting to be its final report on the remand proceedings (A. 120a). On January 19, 1961, the court below entered its Order (A. 124a) vacating the Commission's order on appeal, which summarizes the Commission's findings (A. 125a) and then recites (A. 126a) that "the Court having considered the foregoing findings as summarized, and the Commission's recommendation based thereon, it now approves the findings and conclusions." The court's Order, with the foregoing as its only basis, vacated the Commission's April 25, 1957, award to Petitioner and remanded the proceedings to the Commission "in order that it may reevaluate the comparative positions of the applicants on the basis of the record as supplemented and make new determinations in the light thereof, and take such further action, if any, as the Commission shall deem appropriate."

Petitioner thereupon filed a petition for rehearing of the January 19th Order. (R. 1151). In this peti-

[7] Rule 18(j) of the court below provides, "*Amici curiae* will not be permitted to participate in the oral argument, without leave of the Court, for extraordinary reasons shown, . . ."

tion, Petitioner contended that the court below could not properly vacate the decision granting Petitioner's application without affording Petitioner a hearing, that it could not vacate the decision except upon a review of the whole record or such portions thereof as might be cited by the parties and that it could not properly remand the "entire matter" to the Commission unless, after hearing, it found that the evidentiary hearing record on remand justified further Commission action and that further proceedings proposed to it by the Commission were appropriate. This petition, opposed by Respondents (R. 1172A, 1173 and 1176), was denied by the court below by Order dated February 16, 1961 (A. 126a) which contained no recital of reasons. Petitioner thereupon requested a stay of mandate, to permit it to make application for *certiorari* to this Court (R. 1181). The stay opposed by the Commission (R. 1183A) and Respondent MBT (R. 1191) was granted by Order dated March 9, 1961 (A. 127a).

REASONS FOR GRANTING THE WRIT

The questions presented here raise important and far-reaching issues calling upon this Court:

(a) to "ascertain and enforce the spheres of authority which Congress has given to the Commission and the courts," *FCC* v. *Pottsville Broadcasting Co.*, 209 U.S. 136, in circumstances where allegations of newly discovered evidence are made after an appeal is taken under 47 USC 402 as that Act was amended subsequent to this Court's decision in the *Pottsville* case;

(b) to determine whether the fundamental principle that "... a Court cannot deprive a successful party of his judgment without a proper hearing." *Root Refining Co.* v. *Universal Oil Products Co.*,

285 U.S. 575, 580, is applicable where the "judgment" is a final decision of the Federal Communications Commission and the Court is the court below; and

(c) to determine "questions of importance touching the distribution of judicial authority under the Communications Act of 1934," *FCC* v. *Columbia Broadcasting System*, 311 U.S. 133, specifically whether 5 U.S.C. 1037(c), which expressly authorizes the court below to provide for the making of a supplementary record in an appeal taken under 47 U.S.C. 402(a), implicitly confers such power on the court in an appeal taken under 47 U.S.C. 402(b); and, if so, whether its supervision of the Commission's proceedings was a proper exercise of its "inherent judicial power" or a forbidden reactivation of its "administrative oversight."

These are all questions which have not been, but should be, settled by this Court as specified in its Rule 19 1(b).

The court below in *Fleming* v. *FCC*, 96 App. D.C., 223, 225 F. 2d 523 (1955) for the first time dealt with the question of its power to divest itself of jurisdiction and remand to the Commission for consideration of matters arising after the filing of a 402(b) appeal. Conceding (at 526) that specific statutory power for such a remand was wanting,* it relied on this Court's

* § 16 of the Radio Act of 1927, Ch. 169, 47 U.S.C. 96, which originally authorized the court to take additional evidence upon such terms and conditions as it deemed proper conferred administrative, not judicial, powers upon it. *Fed. Radio Com.* v. *General Electric Co.*, 281 U.S. 467, 469. The power to take and consider new evidence was withdrawn by amendment limiting the court to judicial functions. *Federal Radio Com.* v. *Nelson Bros.*, 289 U.S. 266, 275.

decision in *Ford Motor Co.* v. *NLRB*, 305 US 364, 373, for the view that "the general equity powers which a court exercises in reviewing administrative action" included such authority. (See *Scripps-Howard* v. *FCC*, 311 US 4.) The court made it clear (at 525) however, that only the "particular circumstances" of that case justified its action. (See *Southland Television Co.* v. *FCC*, 105 App. D.C. 282, 266 F. 2d 686 (1959).)

The first time the court below ever asserted the power to retain jurisdiction of a 402(b) appeal while making a remand to the Commission was in *WKAT*, *supra*.[8] In all cases prior to *WKAT* the Court's remand was a final judgment terminating the appeal. There the Commission, before the case came on for argument on the merits, requested a remand on the basis of testimony adduced before the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce. The court, after hearing the parties on the motion in accordance with its uniform practice in such cases, refused to relinquish jurisdiction and reinvest the Commission with jurisdiction as requested and, instead made a 5 USC 1037(c) type remand.

The court below relied for its power to remand the instant case in July, 1958, (A. 23a) on its holding in *WKAT*, *supra*, "that what was explicit as an added procedural course in a § 402(a) review was implicit in the exercise of our review function pursuant to the Commission's motion in a 402(b) appeal". It did not advert to this Court's action in granting certiorari in

[8] See also *WORZ* v. *FCC*, 106 App. D.C. 14, 268 F. 2d 889, by a divided court, and *United Airlines et al.* v. *CAB*, 281 F. 2d 53.

1940 to make clear that, "in so far as action of the Federal Communications Commission is subject to judicial review, the Act bifurcates access to the lower Federal courts according to the subject matter before the Commission", (*FCC* v. *CBS, supra,* at 133). At that time judicial review of matters covered by § 402(a) was assimilated to the Urgent Deficiencies Act. Act of October 22, 1913 (38 Stat. 219)—it is now controlled by the "Judicial Review Act of 1950," 5 U.S.C. 1031-1042. Judicial review of orders specified in § 402(b) however continues to run the very different course specified in 47 U.S.C. §§ 402(c) through (j), and in § 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009(e). Comparison of 5 U.S.C. 1037 and 5 U.S.C. 1009(e) negates any suggestion that either was intended to implement the other. The attempt of the court below to bridge the bifurcated courses separately channelled by § 402(a) and by § 402(b) invites this Court's attention as did its previous attempt to blend the two.

The Court's continuous administrative oversight of the Commissions conduct of the remand proceedings in this case raises serious questions of whether the court has not overstepped the bounds in which Congress placed it at the time it amended the Radio Act of 1927 to take away from the court below any supervisory function with respect to the licensing of radio stations and to confine it to the decision of "questions of law" presented on appeal which "limitation manifestly demands judicial, as distinguished from administrative review". *Federal Radio Commission* v. *Nelson Brothers*, 289 U.S. 266, 276. Any doubt that the court below ventured on an incursion into the administrative

field is removed by examination of the detailed and minute manner in which it supervised every step taken by the Commission in the remand proceedings, from specifying who could be admitted as parties, approving the Commission's action in admitting parties, providing for cross examination and submission of rebuttal testimony by persons concerning whom any evidence might be received, requiring the Commission to permit intervention of the Attorney General of the United States or his designated representative as *amicus curiae*, approving the Commission's selection of Judge Stern as Special Hearing Examiner and requiring submission of the Commission's hearing schedule for approval to requiring the submission for approval of detailed progress reports throughout the proceeding. Only by holding that what the Commission did on the remanded proceeding was not an exercise by it of administrative functions can the supervision of these actions by the court be held not to constitute the exercise of a banned "administrative oversight." "Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies." *Pottsville, supra*, at 144, 146.

In *Enterprise Co.* v. *FCC*, 97 App. D.C. 374, 231 F. 2d 708 (1953) the court decided all the questions raised in the notice of appeal and held in connection with its remand that the Commission should not set aside the award of a construction permit made in a comparative hearing in which the record is later reopened for new evidence until "after taking account of this evidence in reappraising the comparative qualifications" of the

applicants.[10] See also *United Airlines, et al.* v. *CAB*, 281 F. 2d 53, 58. Compare its action here (A. 1a-19a, 124a, 126a)

As this case now stands, the Commission's judicially reviewed and approved decision granting Petitioner's application and its over 170 pages of findings and conclusions on "Twenty-two vast volumes of transcript and exhibits" which boiled down in the Joint Appendix below ran "through nearly 900 printed pages" is junked and some 16 months' time and effort at the Commission (between the issuance of the Examiner's Initial Decision on January 4, 1956, Joint Appendix 423 and the Commission's decision and order on April 27, 1957) and some 14 months in the court below (May 1957 to July 1958) completely wasted. Such profligacy in any case could only be reconciled with the parsimonious principles underlying the doctrines of judicial and administrative finality under the pressure of an irresistible finding that the Commission's decision granting Petitioner's application was fatally defective. Where, as here, it is asserted to stem from a finding that "the basic foundation of the grant" is "unimpaired" (A. 99a) it violates the fundamental concept that the public has an important stake in preserving and utilizing administrative findings tested and found sound on judicial review. See 47 USC 402(h), see also *Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 256; *Federal Power Comm.* v. *Pacific Power & L.*, 307 U. S., 156, 160.

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[10] The Commission itself has uniformly followed this procedure. See In re WJR, 16 Pike and Fischer, Radio Regulation, 321, 326, affirmed, Butterfield, et al. v. FCC, 106 App. D.C. 283, 272 F. 2d 512 (1959).

The time is ripe for intervention by this Court to lay down rules and principles defining the power and duties of the court below in dealing with issues raised by evidence coming to light after the proceeding is on appeal which might "possibly" justify a different result. In view of the continuing safeguards against the operation of radio or television stations by unqualified licensees embodied in 47 USC 312, particularly subsection (a) (2) thereof, such a remand is not as necessary to protect the public in a 402(b) case as it may be where agency powers to act in the public interest would otherwise be cut off. Since such a remand always conflicts with the public interest in early and final determination of administrative and judicial proceedings,[11] it follows that the power to make it should be employed sparingly and only if consideration of the parties, contentions leaves no alternative.

Where, as here, the existence, validity and truth of such evidence is seriously and responsibly challenged, and its importance, i.e., the likelihood that it would require a different result, is equally seriously questioned, summary and arbitrary action of the court without any consideration of the evidentiary record involved, and without hearing any argument in opposition to the representations of a single party, so far departs "from the accepted and usual course of judi-

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[11] The Commission holds it to be more in the public interest to terminate comparative television hearings finally than to reopen them to provide the best qualified successor to a successful applicant who elects later to assign his permit. Denver Television, 10 Pike & Fischer Radio Regulation 771.

cial proceedings" as to call for its review under Rule 19 1(b) of this Court.

CONCLUSION

Wherefore the writ should issue.

Respectfully submitted,

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Proof of Service

I, Harry J. Ockershausen, one of the attorneys for WHDH, Inc., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on March 21, 1961, I served a copy of the foregoing Petition for Writ of Certiorari and the separate Appendix thereto on The Solicitor General of the United States; Federal Communications Commission, Respondent herein; Massachusetts Bay Telecasters, Inc., Respondent herein; and Greater Boston Television Corporation, Respondent herein, by mailing copies, in duly addressed envelopes, with first class postage (or air mail postage, as indicated) prepaid, as follows:

To: Solicitor General,
Department of Justice
Washington 25, D. C.—first class postage

To: John L. Fitzgerald, Esq.
General Counsel
Federal Communications Commission
Washington 25, D. C.—first class postage

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APPENDIX

STATUTES INVOLVED

Communications Act of 1934, as Amended

* * * * * * *

48 Stat. 1064, 47 U. S. C. Sec. 151-609.

Sec. 312. *Administrative Sanctions*

"(a) The Commission may revoke any station license or construction permit—

* * * * * * *

"(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;"

Sec. 402. *Proceedings to Enjoin, Set Aside, Annul, or Suspend Orders of the Commission*

"(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

"(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

"(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

"(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

"(4) By any applicant for the permit required by Section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

"(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

"(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3) and (4) hereof.

"(7) By any person upon whom an order to cease and desist has been served under Section 312 of this Act.

"(8) By any radio operator whose license has been suspended by the Commission.

"(c) such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending

hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

"(d) Within thirty days after the filing of an appeal, the Commission shall file with the court the record upon which the order complained of was entered, as provided in Section 2112 of Title 28, United States Code.

"(e) Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

"(f) The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

"(g) At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by Section 10(e) of the Administrative Procedure Act.

"(h) In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of

the proceedings already had and the record upon which said appeal was heard and determined.

"(i) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

"(j) The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under Section 1254 of Title 28 of the United States Code, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section."

Administrative Procedure Act

60 Stat. 237, 5 U. S. C. Sec. 1001-1011

* * * * * * *

Sec. 10. *Judicial Review*

* * * * * * *

"(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 or otherwise

reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Judicial Review Act of 1950

64 Stat. 1129, 5 U. S. C. Sec. 1031-1042

* * * * * * *

Sec. 2. *Jurisdiction*

"The Court of Appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of Section 402(a) of the Communications Act of 1934, as amended, and . . ."

* * * * * *

Sec. 7. *Additional evidence*

"(c) If a party to a proceeding to review shall apply to the court of appeals, in which the proceeding is pending, for leave to adduce additional evidence and shall show to the satisfaction of such court (1) that such additional evidence is material, and (2) that there were reasonable grounds for failure to adduce such evidence before the agency, such court may order such additional evidence and any counter-evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken and may modify or set aside its order and shall file in the court such additional evidence, such modified findings or new findings, and such modified order or the order setting aside the original order."

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IN THE

Supreme Court of the United States

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13896

MASSACHUSETTS BAY TELECASTERS, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
WHDH, INC., *Intervenor*

No. 13899

GREATER BOSTON TELEVISION CORPORATION, *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
WHDH, INC., *Intervenor*

Appeals from the Federal Communications Commission

Decided July 31, 1958

Mr. Henry E. Foley, of the bar of the Supreme Judicial Court of Massachusetts, *pro hac vice*, by special leave of Court, with whom *Messrs. James A. McKenna, Jr.*, and *David S. Stevens* were on the brief, for appellant in No. 13,896. *Messrs. Vernon L. Wilkinson* and *Lawrence S. Fordham* also entered appearances for appellant in No. 13,896.

Mr. J. Joseph Maloney, Jr., with whom *Messrs. Jeremiah T. Riley* and *Richard Maguire* were on the brief, for appellant in No. 13,899.

Mr. Richard A. Solomon, Assistant General Counsel Federal Communications Commission, with whom *Messrs. Warren E. Baker,* General Counsel, Federal Communications Commission, and *Charles C. McCarter,* Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. William J. Dempsey, with whom *Messrs. William C. Koplovitz* and *Harry J. Ockershausen* were on the brief, for intervenor.

Before EDGERTON, *Chief Judge,* and DANAHER and BURGER, *Circuit Judges.*

DANAHER, *Circuit Judge:* The Federal Communications Commission, by its decision released on April 25, 1957, awarded VHF Channel 5 in Boston to WHDH, Inc. (WHDH), intervenor herein. This corporation had been acquired by the Herald-Traveler Corporation in 1946. WHDH, AM and FM licensee, had in 1947 applied for television facilities. Substantial studies and surveys were undertaken to determine community needs. It commenced closed circuit operations and the training of members of its engineering department. It established community development programs in consultation with civic leaders, and since 1948 had cooperated with the Boston Herald-traveler in experimental local and regional motion picture news coverage for television. Against such background as found by the Commission, and after extensive comparative hearing, WHDH was selected as the "best qualified to bringing service to the public from the standpoint of the operation proposed, the assurance of effectuation of such proposal, and assurance of a continuing awareness of community needs and the meeting of such needs."

Two corporations formed for the purpose of seeking an award of Channel 5, Greater Boston Television Corporation, Inc. (Greater Boston) and Massachusetts Bay Telecasters, Inc. (MBT), have appealed. There had been six

applicants[1] whose mutually exclusive applications had been consolidated by the Commission's order of June 16, 1954, for hearings with respect to significant differences as to:

> (a) The background and experience of each of the ... applicants having a bearing on its ability to own and operate the proposed television station;
>
> (b) The proposals of each of the ... applicants with respect to the management and operation of the proposed station; and
>
> (c) The programming service proposed in each of the ... applications.

Some 13 factors were explored, including local residence, the degree of civic participation and diversification of occupations of the principals, and their experience. The inquiry treated of integration of ownership with management and past broadcast records. Planning and preparation, program policies and proposals, studios and equipment and staff to be employed were gone into. The Commission's policy as to diversification of control of media of mass communications had loomed large in the mind of the Hearing Examiner[2] whose views as to the importance of the factor were not followed by the Commission. Again

[1] The application of Columbia Broadcasting System, Inc., at its own request, was dismissed prior to hearing. The Post Publishing Company withdrew before the Commission decided the case. The application of Allen B. DuMont Laboratories, Inc. (DuMont) was denied in the Commission's final decision, but DuMont has brought no appeal to this court. DuMont's showing on "local factors" was "weak," the Commission concluded.

[2] The Examiner eliminated WHDH because of his interpretation of the Commission's policy concerning concentration of control of media for the dissemination of news and views within the same area. See discussion in Part IV *infra*. He also considered significant the failure of WHDH to give assurance of a national network affiliation. But see F.C.C. v. Allentown Broadcasting Co., 349 U.S. 358, 363, 364 (1955).

the Examiner was overruled when the Commission refused to accept his condonation of non-disclosure by one of Greater Boston's most important figures who was found knowingly to have concealed his earlier disbarment as a lawyer and his conduct thereafter under an assumed name. It is clear the Commission felt substantial demerit attached to Greater Boston on that account.

Various "preferences" based upon such factors were found in favor of one applicant or another as the Commission evaluated the record.[3] Each of the three parties before us prevailed in one or more respects over the other two. The cumulative total weight of the Commission's appraisal of all factors, it said in effect, impelled its award to WHDH.[4]

I

Both Greater Boston and MBT charge error as to certain rulings by the Hearing Examiner and thereafter by the Commmission.

MBT had sought the introduction in rebuttal of certain exhibits designed to illuminate deficiencies in the pro-

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[3] Our Joint Appendix runs through nearly 900 printed pages. Twenty-two vast volumes of transcript and exhibits had been aggregated during the hearings which were concluded on February 4, 1955, after which the various applicants submitted proposed findings. The Hearing Examiner's Initial Decision was issued on January 4, 1956, following which exceptions were filed, and oral argument was had before the Commission on October 29, 1956. We mention these dates for later reference purposes.

[4] Commissioners McConnaughey, Doerfer, Lee and Mack voted for the award. Commissioner Craven abstained from voting. Commissioner Hyde dissented saying he would have selected an applicant offering a "higher degree of diversification." Commissioner Bartley shared that view and also would have weighed adversely the past record of use by WHDH of its radio station as an adjunct of its newspapers. The dissenting statements of the latter may be found in 13 PIKE & FISCHER RADIO REG. 587 and 588.

posals of its adversaries as to studios, equipment and Staffing. As to such deficiencies the Examiner had also refused to hear the opinions of proffered witnesses. As the Commission sustained its Examiner, it observed that in last analysis, it is the Commission itself which must determine the adequacy of the pending proposals and the significance of inadequacies, if any, which might be developed.

Greater Boston charged the Commission had erred in upholding its Hearing Examiner's refusal to receive in evidence certain employment contracts. These instruments had contained stock options in favor of certain proposed key employees, and Greater Boston claimed the evidence was material in support of its showing on the issue of integration of ownership with management. Greater Boston in its amended application of May 3, 1954, had noted that stock options had been granted to "three prospective employees." The parties stipulated that no improvement should be made with respect to the case of any applicant on and after July 1, 1954. Some months later, when the direct cases of the parties were exchanged, Greater Boston for the first time undertook to identify the "employees." Upon objection that the proffer constituted a variance from the application, the contracts were rejected. With the record before it showing, however, that the employees were later extensively cross-examined and that their proposed status was thus developed, the Commission concluded that the Examiner had ruled correctly. It decided that Greater Boston would have been given an unfair competitive advantage, and that the Examiner had properly exercised his discretion.

We have weighed the effect of these challenged rulings and are persuaded that the Commission did not err. The Commission's rule, 47 C.F.R. 1.365, makes provision for amendment to an application, already designated for hearing, by formal petition with service on other parties, which, for good cause shown, may be granted. The Com-

mission acted within its prerogative where Greater Boston had not shown compliance with the requirements of the rule. The Commission found that no applicant had proposed a type of integration of ownership with management which could be called substantial in nature. Quite apart from the basis upon which the Commission's ruling permissibly was rested, it is clear that Greater Boston on the integration issue was deemed to have been adversely affected because of the demerit attaching to the disqualification of its proposed general manager who had played so important a part in the preparation of Greater Boston's amended application and with the presentation of its case.

The Commission found that no one of the applicants was entitled to a preference with respect to the program proposals. It considered that the contentions as to studios and equipment proposals were of no materiality to the ultimate decision. It found that the personnel selected by each applicant had been disclosed to be fully qualified to perform the duties for which each had been selected, and that the staff proposal of each applicant was entirely adequate to effectuate its planned operation.

The Commission concluded, irrespective of the foregoing, that each of the applicants possessed the qualifications to operate a station in the public interest,[5] so that the rulings complained of lapse into insignificance in any event. We find no prejudicial error.

II

Both Greater Boston and MBT attack the Commission's refusal to reopen the record to receive newly discovered evidnece of alleged antitrust violations on the part of WHDH, including alleged threats by its publisher, one Choate, to use Channel 5 to drive the Boston Globe

[5] Scripps-Howard Radio v. Federal Communications Com'n, 89 U.S. App. D.C. 13, 189 F. 2d 677 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 830 (1951).

out of business. We summarize details as to the Boston Globe issue.

Nearly two years after the hearing record had been closed, and more than one year after the Hearing Examiner had issued his Initial Decision *favorable* to *Greater Boston*, the Globe Newspaper Company, publisher of the Boston Globe, sought on January 30, 1957, to intervene. The Globe asserted an interest as a direct competitor of the Boston Herald-Traveler Corporation, owner of WHDH. Allegedly, Herald-Traveler's representative Choate, during 1955 and 1956, had urged a merger of the Traveler publications with the Globe papers, and had sought to upset the Globe's financing of its projected new plant. In an affidavit by the Globe's treasurer, one John I. Taylor, it was further charged that on January 31, 1956, Choate had threatened "Of course if I get Channel 5 I may drive you out of business." An affidavit by one Reid charged Choate with saying on March 10, 1956, "Wait until we get our TV station and see what happens." Upon what basis Choate could possibly then have supposed WHDH might ultimately prevail does not appear.

Choate's answering deposition alleged that merger discussions had intermittently occurred over a period of some ten years. He denied allegations of "threats," particularly emphasizing that the Examiner only 27 days earlier than the date of the first threat had already recommended the award be made to Greater Boston—not to WHDH. "I am sure I would have been laughed out of the room," he deposed. He noted that the Taylor affidavit had been executed before one Leahy as notary public, but that Leahy was also a "member of the Board of Directors of the Globe Newspaper Company, attorney for that company, and a stockholder of the Greater Boston Television Corporation, an applicant in these proceedings, who has given testimony in these proceedings." We need not go into detail as to other supporting as well as challenging affidavits. Nor need we particularize as to

inferences, permissibly to be drawn by the Commission, for brief references hereinafter will suffice.

Whatever basis may have existed for concern on the part of the Globe's officers, they did nothing throughout 1956 following the Examiner's recommendation favorable to Greater Boston. Not until three months after oral argument had been heard by the Commission on October 29, 1956, was any step taken by the Globe's officers.

The Commission, one member not voting, unanimously denied the Globe's petition since it was untimely and could have been filed well before oral argument had been had. Without actually finding lack of good faith on Globe's part, the Commission recited from the reply of WHDH that Greater Boston's attorney shared offices with the Globe's attorney who could have known "actually, as well as constructively" the status of the proceeding. WHDH had charged also in opposition that the attempted intervention "was a calculated design to achieve longer protection against television operation in Boston by waiting until the last minutes to file its petition," the Commission noted.

On February 13, 1957, Greater Boston, on the basis of the Globe's allegations, sought to reopen the record. Contemporaneously MBT acted likewise, but asked consideration of the subject matter *only* in the event the award was to be made to WHDH. The Commission observed in its memorandum and order denying their motions to reopen, that the final decision has been under consideration since the oral argument on October 29, 1956.[6] Just when the Commission's decision was *actually*

[6] It is not shown on our record that word of the Commission's ultimate decision to award Channel 5 to WHDH had "leaked," but as will be shown, *infra* Part VI, before the award was formally made, certain interested persons had some conversations with at least one member of the Commission. See note 31 *infra* and related text.

reached, we do not know, but it is obvious that protracted diligence must have been required to prepare the Commission's final opinion which occupies 173 printed pages in the Joint Appendix.[7] The decision was released on April 25, 1957.

At the same time, the Commission denied the Globe's petition and those of Greater Boston and MBT to reopen the record. The latter charge error in that denial, but we do not agree. The Examiner had conducted extended inquiry into the operations of the Herald-Traveler in relation to its AM broadcasting. The belated allegations might properly be weighed against what had happened in the past course followed in the operation of WHDH, and with the actual record thus viewed, the claimed effect might have seemed far short of the assertions put forth by the proponents. The additional "facts" alleged might be deemed to have been countered by the proof.

To illustrate, the exhibits filed by WHDH in opposition to the reopening show the Globe over the same period advertising itself as "New England's Fastest Growing Newspaper" with 1956 gains over 1955 of 93,657 in its daily circulation and 63,457 for its Sunday editions, with 1956 gains of 3,508,558 lines in total advertising, which were claimed to be "nearly twice as much in total advertising as the two other Boston newspapers COMBINED."

The Commission failed to find in the record evidence "of a course of action by WHDH designed in any way to injure the Globe or any other newspaper or broadcast station, or which disserved the public interest." It saw nothing in the "threats" which, if made, were not shown to have materialized either as against the Globe's procurement of the loans it had sought or as to its expansion in the publications field. "In the circumstances, and consid-

[7] The Commission's opinion appears in 13 PIKE & FISCHER RADIO REG. 507-587.

ering the length of time which this proceeding spans, offering ample opportunity to call to our attention such matters, if they exist; considering further the laches involved on the part of the Globe in filing the present petition; and considering as well the full opportunity of inquiry afforded during the hearing itself, the Commission declines to reopen this record or permit the intervention requested.'"[8]

In view of the mass of evidence already in the record and the Commission's conclusion that no adequate justification for reopening had been shown, the Commission denied the petitions in the interests of administrative finality. We are persuaded that it has not been shown to have abused its discretion.

III

As we cut through to the heart of this controversy, both appellants basically attack the award as arbitrary, capricious and lacking support in the record. MBT particularizes that the Commission had failed to accord to it sufficient weight in those areas of preference where its superiority is said to have been shown.[9] Greater Boston insists that the decision could not have been based on an impartial and rational consideration of the record. The decision is denounced in its brief as "intellectually dishonest," "a travesty of justice" and replete with "essential dishonesty." The Commission thus is substituted as

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[8] 15 PIKE & FISCHER RADIO REG. 167, 173. Cf. Kentucky Broadcasting Corp. v. Federal Commun. Com'n, 84 U.S. App. D.C. 383, 174 F. 2d 38 (D.C. Cir. 1949); Colorado Radio Corp. v. Federal Communications Com'n, 73 App. D.C. 225, 229, 118 F. 2d 24, 28 (D.C. Cir. 1941).

[9] But see Scripps-Howard Radio v. Federal Communications Com'n, *supra* note 5, and cases cited.

a common target of those parties whose acrimony had previously been spent upon each other.[10]

To illustrate, MBT charged that Greater Boston proposed as its general manager a disbarred lawyer who had first denied under oath but had later admitted the fact of disbarment. Brought out also was the possibly more important item that he had concealed his status and had failed to disclose he had conducted his later business life under another name. Still the Hearing Examiner concluded that the proposed managerial staff of Greater Boston was to be preferred over that of MBT. He felt that this individual might be relied upon in view of the record of his performance over the latest fifteen years. On this last account, the Commission said, the Examiner "dismissed the matter as of no importance."

The Commission, as is its right, evaluated the facts much differently. Noting that in performance of its regulatory functions, it must rely upon full and frank disclosure by its licensees, the Commission insisted upon "complete candor on their part." It found that the individual in question had not disclosed he once had been a lawyer and that other Greater Boston stockholders were not shown to have been informed he had later been doing business under an assumed name. Since the individual had assumed a major part in the presentation of Greater

[10] Certainly discrediting evidence may have the effect of destroying the eligibility of an adversary without enhancing the status of the party offering it. Without a more solid predicate than mere survival, the Commission would not be justified in concluding that the least wounded becomes inevitably in the public interest the most competent to operate an important television property. Of course even innocent stockholders may suffer when there has been deception or deliberate falsity in the furnishing of required information. The effect upon the corporation's qualification to serve the public interest is for the Commission to decide. That Greater Boston suffered here is not beyond understanding. Cf. Communications Comm'n v. WOKO, 329 U.S. 223, 227, 229 (1946).

Boston's application and would have a prominent role in its proposed operations, the Commission's discredit of this proposed general manager led to comparative demerit to Greater Boston's application. That such misrepresentation and concealment of important and relevant information should be received and should be given substantial weight, we have no doubt.

Greater Boston on the other hand sought from the Examiner's findings that MBT's proposed vice president in charge of sales, one Forrester Clark, had on three separate occasions been criticized by Congressional committees "for his business ethics, or lack of them." It was further sought to have the record show that MBT's president had been a sponsor of and contributor to "questionable" groups, that he had been a member of an organization on the Attorney General's proscribed list and "was a particularly evasive witness." Other figures in the MBT structure would have been denounced by innuendo.[11] The Commission discounted all such items.

Nor were personages in WHDH immune. "The Herald-Traveler is owned and run by men who have been found to be in violation of the antitrust laws in their other business," Greater Boston tells us in its brief. The Chairman of the Board of United Shoe Corporation, one Winslow, is also president of the Boston Herald-Traveler Corporation. The Commission points to *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 where, at 345 the court observed that "United's power does not rest on predatory practices. Probably few monopolies could produce a record so free from any taint of that kind of wrongdoing. The violation with which United is now

[11] The biographies of many of the key personnel associated with *each* of the applicants demonstrate on the record highly creditable achievements in various important and widely diversified walks of life. Some of the figures indeed are outstanding in their fields and are nationally known and respected.

charged depends not on moral considerations, but on solely economic considerations." At page 348 the court observed that the Supreme Court had three times, in effect, not only not condemned what United was doing but "one ought to go further and say they were in part endorsed. In the face of these decisions, it would be anomalous to charge the officers of United with any moral deficiency." The Supreme Court of the United States "being satisfied that the findings are justified by the evidence" affirmed. *United Shoe Machinery Corp.* v. *United States,* 347 U.S. 521 (1954).[12]

It may be gathered that the comparative hearing presented a veritable welter of controversy. Perhaps it is not without significance that neither the Hearing Examiner nor any member of the Commission acted in favor of an award to MBT. The Examiner had recommended Greater Boston, as noted, after eliminating WHDH for reasons previously stated.[13] The Commission ruled in favor of WHDH because of its "overall strength." It concluded that the "local factors, the program proposals, and the assurance of effectuation which is gathered from its superior broadcasting record over a period of years in the community concerned and the experience qualifications which its principals demonstrate" were persuasive. Thus it found that WHDH "is the most qualified to provide programming service on a continuing basis in the interests of the population of the coverage area, notwithstanding that the diversification policy of the Commission would be better served by a grant to either Greater

[12] The Commission took note that Allen B. DuMont Laboratories, Inc. was defendant in three civil proceedings brought by appliance dealers who had alleged that DuMont's business practices violated the antitrust laws. "No judgment has been entered, nor are any facts shown . . . which would warrant an adverse finding against DuMont in this regard."

[13] See note 2 *supra.*

Boston or MBT. We believe that from the demonstrated superiority of the service to be expected from WHDH, greater public benefit would flow than would come from the application of our diversification policy in order to effect a grant to one of its competitors."[14]

> "The controversy is in an area into which the courts are seldom justified in intruding. The selection of an awardee from among several qualified applicants is basically a matter of judgment, often difficult and delicate, entrusted by the Congress to the administrative agency. The decisive factors in comparable selections may well vary; sometimes one applicant is superior to another in one respect, whereas in another case one applicant may be superior to its rivals in another feature. And it is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes. Two diametrically opposite schools of thought in respect to the public welfare may both be rational . . . . All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term. They are not for the judiciary."[15]

It would unduly prolong an already far extended discussion were we now to narrate the findings of the Commission with reference to the planning and preparation for television by WHDH,[16] and details as to its broadcasting record over previous years.[17] That the Commis-

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[14] 13 PIKE & FISCHER RADIO REG. at 587, and see 555-557.

[15] Pinellas Broadcasting Co. v. Federal Commun. Com'n, 97 U.S. App. D.C. 236, 238, 230 F. 2d 204, 206 (D.C. Cir. 1956), *cert. denied*, 350 U.S. 1007 (1956); McClatchy Broadcasting Co. v. Federal Commun. Com'n, 99 U.S. App. D.C. 195 and 199, 239 F. 2d 15 and 19 (D.C. Cir. 1956), *cert. denied* as to both, 353 U.S. 918 (1957); Scripp-Howard Radio v. Federal Communications Com'n, *supra* note 5.

[16] But see 13 PIKE & FISCHER RADIO REG. at 555 *et seq.*

[17] *Id.* at 519, 525-26, 555-57.

sion might properly accord great weight to such history seems clear.

IV

It remains only for us to consider the diversification issue. It certainly is so that the owner of a newspaper is not, simply on that account, disqualified as a radio or television licensee.[18] The effect of such ownership and control and the weight to be given to the factor will turn on many circumstances, but the local setting in each case offers a guide. Concentration in some situations may be utterly controlling so far as the public interest is involved. See, for example, *Mansfield Journal Co.* v. *Federal Commun. Com'n*,[19] where a license was denied, not because the applicant published a newspaper but because it utilized its sole newspaper status in the community to achieve a monopoly in advertising and news dissemination.

In the instant case the Commission found that the Boston metropolitan area, including some 65 cities and towns,[20] had a population of 2,369,986. The city itself is a principal trading center for New England, ranking high in addition as a cultural center, with some 62 institutions of higher learning. The Commission noted that there were at the time of its decision, 8 daily newspapers published

[18] McClatchy Broadcasting Co. v. Federal Commun. Com'n, *supra* note 15.

[19] 86 U.S. App. D.C. 102, 180 F. 2d 28 (D.C. Cir. 1950). Compare in this same case the status of Lorain Journal and the various aspects of its monopoly position considered in Lorain Journal v. United States, 342 U.S. 143 (1951).

[20] New Bedford, Fall River, Providence, Springfield, Worcester, Lowell, Nashua, Concord and many other substantial centers ringing the Boston metropolitan area, present local spheres of influence of press and radio media. Certainly neither the Herald nor the Traveler is shown to possess a dominant position over any competitor either in the city of Boston or the Greater Boston area. Cf. Times-Picayune v. United States, 345 U.S. 594 (1953).

in Boston, although the Post had discontinued publication. In addition to the contested Channel 5 there were 3 VHF channels in Boston. Three UHF channels had been allocated to the area. WHDH was only one of 17 AM broadcasting stations and was one of 10 FM stations. The Commission noted that while the Boston Herald and the Boston Traveler newspapers are conducted as a joint enterprise for purposes of accounting, purchasing and sales, each has its own managing editor and each takes a different editorial position. That both are in avid competition with the Morning Globe and the Evening Globe, just as is the Sunday Herald with the Sunday Globe, has been clearly established.

The Examiner in considering this aspect of the problem in effect decided that WHDH was disqualified, and thus he eliminated WHDH, largely in reliance upon the Commission's position as he interpreted its application in *Radio Wisconsin, Incorporated*.[21] The Commission, however, distinguished that case, pointing out that both applicants there possessed not dissimilar diversification aspects, that both were closely matched in other areas of comparison, and that the position of Badger Television Company in terms of its localization had been sufficient to control the award to Radio Wisconsin. It explained here that the statements in its earlier opinion relative to diversification must be read in comparative context, but always to the end that diversification of the media of mass communications must receive consideration as a comparative factor. The Commission's instant opinion recalled that it "has never . . . stated that an applicant which has suffered a loss of preference on the grounds of diversification is to be disqualified." It was pointed out:

> "Indeed in representations from time to time over a period of years to the Congress which has sought its views, inter alia, upon proposed legislation pre-

[21] 10 PIKE & FISCHER RADIO REG. 1224.

cluding discrimination against newspaper interests applying for broadcast licenses, the Commission has firmly stated that such legislation was and is unnecessary because the Commission has not discriminated against such applicants, has no intention to do so, and has rather given comparative weight in a given proceeding, on a case by case approach, to such facts as are presented with respect to diversification elements such as newspaper interests, theater interests, broadcast interests and other media of widespread communications."[22]

The Commission's policy as explained and applied in this case not only seems clear and quite within the Commission's competence, but comports precisely with this court's treatment of the problem, as a matter of principle, in the *McClatchy* case.[23] There we had approvingly leaned to the Examiner's statement that the diversification factor should not weigh against an applicant already engaged in the dissemination of information to the public unless there had been exhibited a monopolistic tendency or unless a grant to such an applicant would tend to create a monopoly. Even so, we noted that the Commission, in given circumstances, was completely within its prerogative when it there disagreed with its Examiner. That the Commission has a choice we recognized, even where we thought the Examiner's conclusion might well have prevailed. We upheld the Commission.

In short, the diversification factor is important, but may be counterbalanced by other factors. Our test lies in whether or not in the Commission's performance of its duty of determining which applicant will better serve the public interest, it is shown to have considered diversification of control in connection with all other relevant factors, and that such significance as may attach has reasonably

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[22] 13 PIKE & FISCHER RADIO REG. at 585.

[23] *Supra* note 15.

been weighed and is rationally supported by the record, as the Commission finally evaluated the effect of this factor. It may reject a newspaper's application and grant that of a competing non-newspaper applicant if it acts reasonably, and if it does so after considering and comparing all other relevant factors. The converse is equally true.

We have considered the problem at length because of its clear importance in the overall setting before us. We cannot say that the Commission has acted unreasonably.

Against the broad background of the area to be served and considering the many outlets for expression of every possible viewpoint on every conceivable subject, we cannot assume that any party to this case, combining the various media of mass communication, could achieve any significant control over the minds and the thinking of the listening audience affected.[24] We are satisfied, in short, that the Commission has exercised its permissible judgment with respect to the weight to be given to the factor under scrutiny. Although under earlier legislation we had been authorized to act as a revising authority, Congress has terminated our administrative oversight. We are restricted to purely judicial review and may correct only

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[24] We are not unmindful of the situation prevailing in the District of Columbia area. The Washington Post Company publishes the daily and Sunday editions of the Washington Post and Times Herald, and is owner of WTOP-TV and of WTOP-AM and FM broadcasting stations. At the same time the Evening Star Newspaper Company daily publishes the Evening Star with its Sunday edition and owns the Evening Star Broadcasting Company which operates WMAL-TV and the WMAL-AM and FM broadcasting stations. It may be doubted that the populace of the District of Columbia and the surrounding areas served by these various media is aware of any significant deprivation of access either to current news or to opinion expressed. Certainly no such combination of media exercises "dominant" or even measurable control over local thought. Cf. Clarksburg Pub. Co. v. Federal Communications Com'n, 96 U.S. App. D.C. 211, 225 F. 2d 511 (D.C. Cir. 1955).

errors of law.[25] We find no basis upon which we may substitute our judgment for that of the Commission that the award here made is in the public interest.

V

Since review had here been sought under 47 U.S.C. § 402(b), the Act[26] commands that in the exercise of our function we will be guided by § 10(e) of the Administrative Procedure Act.[27] We have undertaken, so far as necessary to decision and where presented, to decide the relevant questions here raised. We have reviewed the record and have taken due account, as the statute reads, "of the rule of prejudicial error." The Commission's choice may not have been inevitable, but the discretion to choose is wide. We cannot say that abuse has been demonstrated or that the Commission has not acted in the public interest.[28] We are satisfied that the Commission's findings and conclusions are not lacking in substantial support on the whole record. Accordingly, and without more, we would now be bound to affirm. We thus rule definitively so that repose may enfold this litigation if the steps next to be prescribed shall disclose no vitiating developments.[29]

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[25] Federal Comm'n v. [Pottsville] Broadcasting Co., 309 U.S. 134 (1940).

[26] 47 U.S.C. § 402(g) (1952).

[27] 5 U.S.C. § 1009(e) (1952).

[28] Scripps-Howard Radio v. Federal Communications Com'n, *supra* note 5; Johnston Broadcasting Co. v. Federal Commun. Com'n, 85 U.S. App. D.C. 40, 46, 175 F. 2d 351, 357 (D.C. Cir. 1949).

[29] We cannot now know what may be the state of the record after the hearing we are ordering. Fleming v. Federal Communications Commission, 96 U.S. App. D.C. 223, 226, 225 F. 2d 523, 526 (D.C. Cir. 1955); cf. United States v. Shotwell Mfg. Co., 355 U.S. 233, 241 *et seq.* (1957).

VI

While the lengthy record here has been under study the Commission moved to remand cases No. 13718, No. 14021 and No. 14170, *WKAT, Inc.* v. *Federal Communications Commission*, and No. 13725, *Eastern Airlines, Inc.* v. *Federal Communications Commission*. After argument by all counsel we entered our order of remand. We took note that public charges had been made in the course of a Congressional investigation of regulatory agencies[30] that one of the Commissioners who participated in the proceedings before the Commission, but who had since resigned, should have disqualified himself in that case. That Commissioner had participated in the instant case, as our record shows, but whether or not he should also have been disqualified here, does not appear.

The Commission in the Channel 10, Miami, cases had lodged with the clerk of this court a transcript of the Congressional hearings. In the course of our study of that transcript we observed from Vol. 28, commencing at page 4,180 and from following pages, as disclosed by another Commissioner's own sworn testimony, that various individuals connected with some of the parties to the instant appeals had conferred with him with reference to the pending case while the matter was under consideration by the Commission and before the issuance of its final decision on April 25, 1957. Among such individuals were one Forrester Clark, of MBT, one Robert Choate of WHDH, and certain representatives of the Boston Globe.[31]

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[30] Conducted by the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce.

[31] Mr. McConnaughey testified:

"They came in my office with two brothers or cousins and they just read the riot act to me about ever granting this

Whether or not others to us unknown may have acted similarly, or whether or not any such individual named or unnamed, approached any other Commissioner and, if so, with what result, if any, we cannot know from the present record. Nor does it appear that any such persons actually represented or purported to speak for any of the parties here, or whether such parties had knowledge of such action as may have been taken.[32]

Our order of April 17, 1958, in the above identified Channel 10, Miami, proceedings, directed that those cases

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about ever considering voting for the Boston Traveler or whatever it is. They were not even parties.

* * * *

"The Chairman: For or on behalf of anybody?

"Mr. McConnaughey: Yes. They just came in to tell me. I don't know who else they talked to." Transcript p. 4,185. [The date of this conference does not appear.]

[32] The spirit of the law and what lawyers are to understand that spirit to be may be discerned from the following: 47 U.S.C. § 409(e)(1) provides that no examiner conducting an adjudicatory hearing "shall . . . consult any person . . . on any fact or question of law in issue, unless upon notice and opportunity for all parties to participate." Nor shall any such examiner advise or consult with the Commission with respect to the initial decision or exceptions. 47 U.S.C. § 409(e)(2) provides with reference to an adjudicatory hearing, that "no person who has participated in the presentation or preparation for presentation of such case before an examiner . . . or the Commission . . . shall . . . directly or indirectly make any additional presentation respecting such case, unless upon notice and opportunity for all parties to participate." The Canons of Ethics of the Federal Communications Bar Association prescribe as to contested proceedings, that "it is improper for lawyers to communicate privately with a Commissioner . . . concerning the merits of a pending cause in the absence of opposite counsel or without notice to them." Lawyers are to use their best efforts to restrain and to prevent "clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards the Commission." We know of no dereliction in any of the foregoing respects by any attorney for any party in this case.

be remanded to the Commission with instructions to proceed forthwith to hold an evidentiary hearing concerning the possibility that the award theretofore made might be void *ab initio*, or voidable and that a party or various parties, might be disqualified by reason of misconduct to receive an award of a television permit. We directed that the Commission make, but not be limited to, findings of fact in certain specified particulars.

We now direct a similar evidentiary hearing in this case. Adapting as pertinent to the instant situation, the formula previously prescribed as above, the findings shall include, but not be limited to:

> Whether or not any *member* of the Commission should have disqualified himself in the present case;
>
> Whether any *person* or *persons* influenced or attempted to influence any member of the Commission in any manner whatsoever except by the recognized and public processes of adjudication (see *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F.2d 514, 534-35, 540-41 (3 Cir. 1948), and if so, the full facts and circumstances;
>
> Whether any *party* to the proceeding before the Commission directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct which may be found by the Commission to have occurred;
>
> Whether or not in the light of such findings, the grant of a permit for Channel 5, Boston, was void *ab initio* and if not, is voidable and action should be taken to set it aside, and whether any one applicant or more than one may have been disqualified to receive a grant of its application; and
>
> Whether the conduct of any applicant if not of disqualifying character, has been such as to reflect adversely upon such applicant from a comparative standpoint.

WHDH, Greater Boston, MBT, and DuMont, as parties to the case before the Commission, are to be admitted, if

they so desire, to participate as parties in the reopened evidentiary hearing. Any person or persons concerning whom evidence may be received in such hearing is, upon request, to be permitted to cross-examine and to submit rebuttal testimony. Of course, as in the Channel 10, Miami, case, the Commission shall notify the Attorney General of the United States of the pendency of the hearings, and of their purpose that he may, through his designated representative, upon request made, participate in the hearing as amicus curiae.

Our order will provide that the status quo is to be maintained, and that we retain jurisdiction of these appeals pending receipt of the findings and final report of the Commission. In addition the Commission will, within 60 days from the date of our order, report to this court its progress, with such recommendations as to the Commission may seem desirable at that stage of the proceeding.

5 U.S.C. § 1037(c) expressly authorizes a party to an appeal under 47 U.S.C. § 402(a) to apply for leave to adduce additional evidence under circumstances there defined. We held in the Channel 10, Miami, proceedings that what was explicit as an added procedural course in a § 402(a) review was implicit in the exercise of our review function pursuant to the Commission's motion in a § 402 (b) appeal.[33] Clearly, under 47 U.S.C. § 402(h), were we to reverse the Commission's order, upon remand it would become the duty of the Commission to act on the basis of the proceedings already had "unless otherwise ordered by the court."

But we have hitherto observed that after-discovered circumstances, even without the fault of an agency, may preclude a proper and just result.[34] Proof of the lack of

[33] Scripps-Howard Radio v. Comm'n, 316 U.S. 4, 16, 17 (1942).

[34] Fleming v. Federal Communications Commission, *supra* note 29.

competency of a party to receive an award may require an adjustment of the relief otherwise to be accorded. Improper influence, if established, going to the very core of the Commission's quasi-judicial powers is certainly critical. We should have the benefit of the Commission's determination in such matters before deciding ultimately what disposition should be made of this case. We recognize the primary responsibility and function of the Commission itself in these particulars.

Accordingly, it is to be understood that it is for the Commission initially to determine, subject to review in usual course, the competence of its individual members to have participated in the award, but with appropriate findings with respect to its ultimate conclusions. We deem it the Commission's proper duty and function to determine the basic qualifications of each of the four named parties who may appear in the evidentiary hearing as they participated before the Commission on October 29, 1956.

We will expect the progress report in due course as indicated, and ultimately in the light of developments, such findings as to the issues defined in this Part VI as may supplement the record upon which this appeal had so far been based.

Remanded accordingly.

Chief Judge Edgerton Concurs in the result.

United States Court of Appeals for the
District of Columbia Circuit
Filed July 31, 1958

Order

These appeals came on for hearing on the record from the Federal Communications Commission, and were argued by counsel.

On consideration whereof, and for the reasons indicated in our opinion this day filed herein, and for the purposes hereinafter set forth, it is

ORDERED by the court that these cases be, and they are hereby, remanded to the Federal Communications Commission with instructions to proceed forthwith to hold an evidentiary hearing concerning the possibility that the award heretofore made may be void *ab initio* or voidable and that a party, or various parties, might be disqualified by reason of misconduct to receive an award of a television construction permit; that in connection with that hearing the Commission shall make, at least in part but not be limited to, findings of fact in the following particulars:

(1) Whether or not any *member* of the Commission should have disqualified himself in the present case;

(2) Whether any *person* or *persons* influenced or attempted to influence any member of the Commission in any manner whatsoever except by the recognized and public processes of adjudication (see *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F.2d 514, 534-35, 540-41 (3rd Cir. 1948)), and if so, the full facts and circumstances;

(3) Whether any *party* to the proceeding before the Commission directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct which may be found by the Commission to have occurred;

(4) Whether or not in the light of such findings, the grant of a permit for Channel 5, Boston, was void *ab initio* and if not, is voidable and action should be taken to set it aside, and whether any one applicant

or more than one may have been disqualified to receive a grant of its application; and

(5) Whether the conduct of any party-applicant if not of a disqualifying character, has been such as to reflect adversely upon such party-applicant from a comparative standpoint.

And it is further ordered by the court that all parties to these cases before the Commission as of October 29, 1956, shall be admitted to participate as parties in the evidentiary hearing, if they so request, and that any person or persons concerning whom evidence may be received in such hearing shall, upon request, be permitted to cross-examine and to submit rebuttal testimony;

And the Commission is further instructed to notify the Attorney General of the United States of the pendency of its evidentiary hearing and the purpose thereof; and to permit him, or his designated representative, if he so moves, to participate in the hearing as amicus curiae;

And it is further ordered by the court that the status quo in these cases shall be maintained pending further order of this court, and this court hereby retains jurisdiction of these appeals pending receipt of the findings and final report of the Commission pursuant to this order;

And it is further ordered by the court that the Commission report to this court its progress upon the foregoing duties within sixty days from the date of this order, with such recommendations as to the Commission may seem desirable at that stage of the proceeding.

PER CURIAM.

Dated: July 31, 1958.

United States Court of Appeals for the
District of Columbia Circuit
Filed Aug. 4, 1958

Order

The clerk is hereby directed to strike out the following notation appearing at the bottom of page 24 of the opinion filed herein July 31, 1958,

"Chief Judge Edgerton concurs in the result."

and to insert in lieu thereof the following:

Chief Judge Edgerton concurs in the remand, but dissents from the court's action in ruling on the merits at this time.

Per Chief Judge Edgerton

Dated: August 4, 1958

United States Court of Appeals for the
District of Columbia Circuit
Filed Sep. 12, 1958

Order

Upon consideration of appellant's petition for a rehearing, it is

Ordered by the court that the aforesaid petition be, and it is hereby, denied.

Dated: September 12, 1958

Chief Judge Edgerton would grant the petition for rehearing.

Per Curiam.

United States Court of Appeals for the
District of Columbia Circuit
Filed Sep. 12, 1958

Order

Upon consideration of appellant's petition for a rehearing en banc, it is

ORDERED by the court that the aforesaid petition be, and it is hereby, denied.

Dated: September 12, 1958

Circuit Judge Bazelon would grant the petition for rehearing en banc.

PER CURIAM.

Order

It is ORDERED that appellant's motion to stay the mandate of this court or to stay the transmission of the order of this court entered July 31, 1958 to and including October 17, 1958, be, and it is hereby, granted pursuant to Rule 31(k)(2) of this court.

FOR THE COURT:

JOSEPH W. STEWART, *Clerk*

By:

WILLIAM G. SECREST
Chief Deputy Clerk

Dated: September 29, 1958.

United States Court of Appeals for the
District of Columbia Circuit
Filed Sep. 30, 1958

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 13,896

MASSACHUSETTS BAY TELECASTERS, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

WHDH, INC., *Intervenor.*

Case No. 13,899

GREATER BOSTON TELEVISION CORPORATION, *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

WHDH, INC., *Intervenor.*

Report of Progress

1. On July 31, 1958 this Court remanded the above-entitled cases to the Federal Communications Commission with instructions to hold an evidentiary hearing concerning the possibility that the award heretofore granted may be void *ab initio* or voidable and that a party or various parties may be disqualified to receive an award of a television construction permit or may have engaged in conduct which, while not disqualifying, would reflect adversely upon the applicant from a comparative standpoint. On September 12, 1958, the Court denied a petition for rehearing filed by Massachusetts Bay Telecasters, Inc. In connection with its remand order the Court directed the Commission to report its progress concerning such evidentiary hearing to the Court on or before September 29, 1958. In accordance with this latter instruction the Commission hereby files its Report of Progress.

2. While the cases were pending before the Court on petition for rehearing, the Commission engaged in a thor-

ough study and analysis of all the material brought out before the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce as well as pertinent material presently in the Commission's files. On September 24, 1958, subsequent to the Court's denial of rehearing, the Commission discussed the results of its study and decided that the material presently available is too fragmentary and incomplete for the Commission to proceed immediately to hearing without some preliminary investigation. The congressional inquiry into the instant cases--unlike its intensive investigation of the Miami Channel 10 case (*WKAT, Inc.* v. *Federal Communications Commission*, Case Nos. 13718, 14021 and 14170, and *Eastern Airlines, Inc.* v. *Federal Communications Commission*, Case 13725)—was cursory and, as the Court noted (Sl. Op. pp. 20, 21), sheds no light on a number of pertinent questions. The Commission accordingly instructed its staff to institute a pre-hearing investigation at once with a view toward an early designation of the matter for formal hearing on the issues specified by the Court and such other issues, if any, as may then appear relevant. As soon as the necessary investigative work is sufficiently advanced to permit an order of hearing, the Commission will report further to the Court and enclose a copy of such order.

Respectfully submitted,

JOHN L. FITZGERALD
John L. FitzGerald
General Counsel

RICHARD A. SOLOMON
Richard A. Solomon
Assistant General Counsel

RUTH V. REEL
Ruth V. Reel
Counsel

FEDERAL COMMUNICATIONS COMMISSION

September 26, 1958

United States Court of Appeals for the
District of Columbia Circuit
Filed Oct. 6, 1958

Order

The Federal Communications Commission having filed on September 30, 1958, a report of progress with respect to the holding of an evidentiary hearing in conformity with the order of this court entered herein July 31, 1958, and the Commission in its progress report having stated that it has instructed its staff to institute a pre-hearing investigation with a view to an early designation of a formal hearing on the matters covered in this court's order of July 31, 1958, it is

ORDERED by the court that the Commission on November 3, 1958, file a further report of its progress with respect to the holding of such evidentiary hearing, notwithstanding the order of September 29, 1958, staying until October 17, 1958, the transmission to the Commission of the order of July 31, 1958.

United States Court of Appeals for the
District of Columbia Circuit
Filed Nov. 3, 1958

Further Report of Progress

1. On October 6, 1958 this Court ordered the Commission to file on November 3, 1958 a further report of progress with respect to holding the evidentiary hearing in conformity with the order of this Court entered July 31, 1958. In accordance with the order of October 6, 1958 the Commission hereby files its Further Report of Progress (a previous report having been filed on September 26, 1958).

2. In accordance with the Commission's instructions to the staff, referred to in our report of September 26, 1958, the pre-hearing investigation has been pursued actively. The staff has questioned a number of persons who it

believes may have information about the case. Steps have been taken to determine the availability of any possible further information in the files of the Legislative Oversight Subcommittee. Further investigations in the field are planned this month with the hope that the matter can be designated for hearing in December or January.

Respectfully submitted,

JOHN L. FITZGERALD
John L. FitzGerald
General Counsel

United States Court of Appeals for the District of Columbia Circuit
Filed Nov. 12, 1958

Order

The Federal Communications Commission having filed on September 30, 1958, and on November 3, 1958, reports of progress with respect to the holding of an evidentiary hearing in conformity with the order of this court entered herein July 31, 1958, and the Commission in its reports having advised this court that a prehearing investigation has been instituted, that investigations are under way and that the Commission's hopes that the matter may be designated for hearing in December or January, it is

ORDERED by the court that the Commission on December 15, 1958, file a further report of its progress with respect to the holding of such hearing specifically setting forth whether the hearing has begun or has been scheduled, and if only scheduled, at what time it is to begin, and if the hearing has not begun or been scheduled, an explanation as to the reason for delay.

PER CURIAM.

United States Court of Appeals for the
District of Columbia Circuit
Filed Dec. 5, 1958

Further Report of Progress

Pursuant to the Order of the Court of November 12, 1958 in the above-entitled actions, the Federal Communications Commission, appellee therein, files this Further Report of Progress with respect to its compliance with the Court's Order of July 31, 1958.

On December 4, 1958 the Commission, by Order released December 5, 1958 has designated the proceeding for hearing before Judge Horace Stern sitting as a special Commission Hearing Examiner upon four issues specified in the Order. Copies of this Order are attached. As examination thereof will show the date for actual commencement of the hearing has been left by the Commission for determination by Judge Stern. Counsel for the Office of General Counsel of the Federal Communications Commission, to whom has been delegated the responsibility of trying the case for the Commission, intend now to request Judge Stern to set a date for a prehearing conference at his earliest convenience at a mutually convenient date in the near future. Also, the Attorney General of the United States is being advised of the entry of this Order so that he may participate in the hearing as amicus curiae in accordance with the Commission's Order should he choose to do so.

Respectfully submitted,

JOHN L. FITZGERALD
John L. FitzGerald
General Counsel

EDGAR W. HOLTZ
Edgar W. Holtz
Associate General Counsel

RICHARD A. SOLOMON
Richard A. Solomon
Assistant General Counsel

FEDERAL COMMUNICATIONS COMMISSION

December 5, 1958

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

FCC 58-1167
66141

In re Applications of

DOCKET No. 8739
File No. BPCT-248

WHDH, INC.
Boston, Massachusetts

DOCKET No. 11070
File No. BPCT-1657

GREATER BOSTON TELEVISION CORP.
Boston, Massachusetts

DOCKET No. 11072
File No. BPCT-1844

MASSACHUSETTS BAY TELECASTERS, INC.
Boston, Massachusetts

DOCKET No. 11073
File No. BPCT-1854

ALLEN B. DUMONT LABORATORIES, INC.
Boston, Massachusetts

For Construction Permits for New Television Stations
(Channel 5)

Order

At a session of the Federal Communications Commission[1] held at its offices in Washington, D. C. on the 4th day of December, 1958;

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[1] Commissioner Lee absent. Commissioner Craven took no part in the consideration of this case.

The Commission having under consideration the Order of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled proceeding, dated July 31, 1958;

IT IS ORDERED, That the record in this proceeding is reopened and further hearing shall be held before Judge Horace Stern on the following issues:

1. To determine whether any member of the Commission who participated should have disqualified himself from voting in the proceedings before the Commission which resulted in the award of a construction permit for a television station on Channel 5 in Boston.

2. To determine whether any person or persons influenced or attempted to influence any member of the Commission with respect to the proceedings resulting in the award of the construction permit for Channel 5, Boston, in any manner whatsoever except by the recognized and public processes of adjudication.

3. To determine whether any party to the proceedings before the Commission which resulted in the award of the construction permit for Channel 5 in Boston directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct or improprieties in connection with the proceedings.

4. To determine, in the light of the facts adduced upon the foregoing issues, whether the grant heretofore made of a construction permit for Channel 5, Boston, was void *ab initio* and if not, whether such grant is voidable and action should be taken to set it aside; whether any of the applicants in this proceeding was and is disqualified to receive a grant of its application; and whether the conduct of any applicant, if not of a disqualifying character, has been such as to reflect adversely upon such applicant from a comparative standpoint.

IT IS FURTHER ORDERED, That the further hearing herein shall be held in the city of Washington, District of Columbia, commencing on a date to be fixed my the presid-

ing officer, with a pre-hearing conference; and that upon petition therefor filed with the Commission, consideration will be given to the holding of hearing sessions at locations other than that specified herein; and

IT IS FURTHER ORDERED, That all parties to this proceeding before the Commission, namely, WHDH, Inc., Greater Boston Television Corp. Massachusetts Bay Telecasters, Inc. and Allen B. DuMont Laboratories, Inc., shall be admitted to participate as parties if they so request, such requests to be submitted on or before December 15, 1958, and that any person or persons concerning whom evidence may be received in the said hearing shall be permitted to cross-examine and to submit rebuttal testimony if he or they request the opportunity to do so; and

IT IS FURTHER ORDERED, That the presiding officer shall permit the Attorney General of the United States or his designated representative, upon request made, to participate in the hearing as *amicus curiae*.

FEDERAL COMMUNICATIONS COMMISSION
Mary Jane Morris
Secretary

Released: December 5, 1958

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals for the
District of Columbia Circuit
Filed Dec. 15, 1958

No. 13,896

No. 13,899

Memorandum

The Federal Communications Commission having filed on December 5, 1958, a further report of progress with respect to the holding of an evidentiary hearing in conformity with the order of this court entered herein on July 31, 1958, and the Commission in its report having stated that it has designated the proceeding for hearing before a special Commission Hearing Examiner upon four issues specified in the order of July 31, 1958, the report of the Commission is hereby approved.

The Commission is requested to notify the court promptly of the date for the actual commencement of the hearing after it has been determined by the Hearing Examiner.

Filed February 2, 1959

Further Report of Progress

Pursuant to the Order of the Court of November 12, 1958, in the above-entitled actions, the Federal Communications Commission on December 5, 1958, filed its Further Report of Progress. We there reported that by Order of December 4, 1958, the Commission had designated this proceeding for hearing before Judge Horace Stern sitting as a special Commission Hearing Examiner at a date to be determined by Judge Stern.

Pursuant to subsequent orders of Judge Stern, prehearing conferences were held in these cases on January 5 and 26, 1959, and the hearings will commence on February 16, 1959. WHDH, Inc., Greater Boston Television, Corp., Massachusetts Bay Telecasters, Inc., and Allen B. Dumont

Laboratories, Inc.,—have been permitted to participate as parties, and the Attorney General of the United States will participate as *amicus curiae*. In addition, the Commission by Memorandum Opinion and Order of January 23, 1959, granted the petition of Globe Newspaper Company to intervene with regard to issue number one having to do with the question of the disqualification of any of the Commissioners, who participated in the final vote awarding the construction permit for Channel 5 in Boston to WHDH, Inc.

Respectfully submitted,

EDGAR W. HOLTZ
Edgar W. Holtz
Asociate General Counsel

RICHARD A. SOLOMON
Richard A. Solomon
Assistant General Counsel

No. 13,896

No. 13,899

United States Court of Appeals for the District of Columbia Circuit
Filed Feb. 10, 1959

Memorandum

The Federal Communications Commission having filed on February 2, 1959, a further report of progress with respect to the holding of an evidentiary hearing in conformity with the order of this court entered herein July 31, 1958, and the Commission in its report having stated *inter alia* that the hearing will commence on February 16, 1959, the report of the Commission is hereby approved.

The Commission is requested to notify the court promptly of the date on which the hearing before the Hearing Examiner is concluded.

Dated: February 10, 1959

Per Curiam.

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of

WHDH, Inc. Boston, Massachusetts	Docket No. 8739 File No. BPCT-248
Greater Boston Television Corp. Boston, Massachusetts	Docket No. 11070 File No. BPCT-1657
Massachusetts Bay Telecasters, Inc. Boston, Massachusetts	Docket No. 11072 File No. BPCT-1844
Allen B. Dumont Laboratories, Inc. Boston, Massachusetts	Docket No. 11073 File No. BPCT-1854

For Construction Permits for New Television Stations (Channel 5)

APPEARANCES

Edgar W. Holtz, Richard A. Solomon (later withdrawn), *James T. Brennan, Joel Rosenbloom, Upton K. Guthery,* Representing General Counsel, Federal Communications Commission; *Robert J. Rawson,* Representing Broadcast Bureau, Federal Communications Commission; *Robert A. Bicks, John C. Danielson,* Department of Justice, Antitrust Division, Representing the Attorney General of the United States; *William J. Dempsey, Harry J. Ockershausen, Thomas E. Dwyer, Thomas M. Joyce,* Representing WHDH, Inc.; *Richard Maguire, J. Joseph Maloney, Jr.,* Representing Greater Boston Television Corp.; *James A. McKenna, Jr., Garrett Hoag, Lawrence S. Fordham,* Representing Massachusetts Bay Telecasters, Inc.; *William A. Roberts, Julian P. Freret, E. D. Johnston,* Representing Allen B. DuMont Laboratories, Inc.; *Neville Miller, John P. Bankson, Jr., Neil Leonard, Joseph Ford, Robert Haydock, Jr.,* Representing Globe Newspaper Company, Intervenor; *David Burnstein,* Representing Maurice Simon, a witness.

Initial Decision of Hearing Examiner Horace Stern

Preliminary Statement

In 1947 WHDH, Inc. filed an application for a construction permit to erect a new television broadcast station to operate on Channel 5 in Boston. Subsequently similar applications were filed by Greater Boston Television Corp., Massachusetts Bay Telecasters, Inc., Allen B. DuMont Laboratories, Inc., Columbia Broadcasting System, Inc., and Post Publishing Company. Being mutually exclusive the applications were consolidated and designated for comparative hearing by order of the Commission of June 16, 1954. The application of Columbia Broadcasting System was dismissed at its own request on November 2, 1954. After several prehearing conferences, hearings began on November 8, 1954, and continued for some 25 days in November and December, 1954, January and February, 1955. The record was closed February 4, 1955. The initial decision of the Chief Hearing Examiner, James D. Cunningham, dated December 30, 1955, was released on January 4, 1956; it awarded the permit to Greater Boston Television Corporation. Exceptions being filed, oral argument thereon was had before the Commission on October 29, 1956, a quorum of four,—Chairman McConnaughey, Commissioners Bartley, Lee, and Mack,—being present. The Post Publishing Company had withdrawn its application on October 24, 1956.

On December 19, 1956, the Commission instructed the staff to draft a memorandum of opinion overruling the decision of the Hearing Examiner and looking toward a grant to WHDH. On the vote on these instructions four Commissioners—McConnaughey, Doerfer, Lee, and Mack—were in favor of WHDH.

On January 30, 1957, Globe Newspaper Company filed a petition to intervene and to reopen the record, replies to which were filed by WHDH and the Broadcast Bureau. On February 13, 1957, Greater Boston Television Corp. and

Massachusetts Bay Telecasters also filed petitions to reopen the record, to which replies were filed by WHDH. All three petitions were denied by the Commission on April 24, 1957.

On that same day, April 24, 1957, the final decision was rendered by the Commission, and released April 25, 1957. It awarded the permit to WHDH, the vote of the Commissioners in favor of WHDH being the same as on the instructions to the staff, Commissioners Hyde and Bartley dissenting and Commissioner Craven abstaining. Greater Boston Television Corp. and Massachusetts Bay Telecasters, on May 24, 1957, filed notices of appeal in the United States Court of Appeals for the District of Columbia Circuit. On April 2, 1958, while these appeals were pending, evidence was adduced before the House Subcommittee on Legislative Oversight which came to the attention of the Court in the Miami Channel 10 appeal to the effect that various individuals connected with some of the parties to the Boston Channel 5 appeals had conferred with Chairman McConnaughey with reference to the pending case while it was under consideration by the Commission and before the issuance of its final decision. The Court (261 F. 2d. 55) sustained the exercise of the Commission's discretion in denying the Globe, Greater Boston and Massachusetts Bay petitions, and approved the Commission's award of the permit to WHDH as being justified by the record; it stated that it would therefore have been bound to affirm the Commission's decision, but, having noticed the testimony before the Congressional Subcommittee, it remanded the record on its own motion, on July 31, 1958, to the Commission to hold an evidentiary hearing and make findings of fact on certain specified issues, all parties to the oral argument before the Commission on October 29, 1956, to be allowed to participate in the reopened hearing and the Attorney General also to be permitted to participate as amicus curiae.

On December 4, 1958, pursuant to the order of remand the Commission ordered the record reopened and further hearing held on the following issues:

1. To determine whether any member of the Commission who participated should have disqualified himself from voting in the proceedings before the Commission which resulted in the award of a construction permit for a television station on Channel 5 in Boston.

2. To determine whether any person or persons influenced or attempted to influence any member of the Commission with respect to the proceedings resulting in the award of the construction permit for Channel 5, Boston, in any manner whatsoever except by the recognized and public processes of adjudication.

3. To determine whether any party to the proceedings before the Commission which resulted in the award of the construction permit for Channel 5 in Boston directly or indirectly secured, aided, confirmed, ratified or knew of any misconduct or improprieties in connection with the proceedings.

4. To determine, in the light of the facts adduced upon the foregoing issues, whether the grant heretofore made of a construction permit for Channel 5, Boston, was void ab initio and, if not, whether such grant is avoidable and action should be taken to set it aside; whether any of the applicants in this proceeding was and is disqualified to receive a grant of its application; and whether the conduct of any applicant, if not of a disqualifying character, has been such as to reflect adversely upon such applicant from a comparative standpoint.

The Globe Newspaper Company, on December 10, 1958, filed a petition to intervene in the present proceedings, and, by order of the Commission of January 21, 1959, was granted leave of intervention but only with respect to issue number one.

Prehearing conferences were held on January 5 and 26, 1959. Hearings were held from February 16 to 20, on February 24 and 25, and on March 9, 1959. Extensive exhibits were introduced in the record. The testimony is contained in pages 3309 to 4794 of the transcript. The witnesses were Robert B. Choate, Forrester A. Clark, George C. McConnaughey, Charles F. Mills, John I. Taylor, William Davis Taylor, Daniel J. Lynch, George E. Akerson, Victor R. Hansen, Maurice Simon, and Warren E. Baker. The record was closed on March 23, 1959. Briefs were filed on or before July 24, 1959.

Testimony and Discussion

The testimony centered principally around Chairman George C. McConnaughey, who served on the Commission from October 4, 1954, to June 30, 1957. It covered an extremely wide range, much of it irrelevant but admitted by the Examiner in the vain hope that, if ultimately developed, it might disclose some pertinence to the issues involved. It will be discussed herein according to the issues prescribed by the Commission, but in somewhat different order.

Issue 2—Did any person or persons influence or attempt to influence any member of the Commission with respect to the proceedings resulting in the award of the construction permit for Channel 5, Boston, in any manner whatsoever except by the recognized and public processes of adjudication?

A. First, as to the Boston Herald-Traveler Corporation, sole owner of WHDH, Inc., the successful applicant for the permit.

Robert B. Choate,—director and vice-president of the Boston Herald-Traveler Corporation, publisher and editor of the Boston Herald and Traveler newspapers, and president of WHDH,—had two lunch meetings with Chairman McConnaughey, although the latter remembers only one of

them. In view of the lapse of time since they took place and the informal nature of the conversation that would ordinarily characterize such occasions it is no wonder that although all the participants impressed the Examiner as being entirely honest and sincere in their desire to recall exactly what was said, they vary to some extent in their recollections, especially as to minor details.

According to Choate the first luncheon was with McConnaughey and Charles F. Mills, a mutual friend, at either the Raleigh or Willard Hotel in the late 1954 or early 1955. Choate identified himself as an applicant for a permit but it was purely a social affair and there was no discussion whatever of the Channel 5 case. The second luncheon meeting was in the public room of the Statler Hotel at either the end of March or the early part of April, 1956, at which there were also present Mills and Thomas M. Joyce, who was a lawyer for the Herald-Traveler Corporation but was not there in that capacity. Choate had sought this meeting in order to show McConnaughey the draft of a proposed "Dempsey Amendment" to the Communications Act (hereinafter explained), together with a supporting memorandum, and in that same connection to talk to him about the testimony which he, McConnaughey, had given on the subject involved before a Subcommittee of the House Committee on Interstate and Foreign Commerce. However, at the very first suggestion of this purpose he was stopped by McConnaughey, the draft and memorandum were not shown, there followed only a general social conversation, and at no time was the Channel 5 case discussed in any manner.

According to Chairman McConnaughey he had only one luncheon meeting with Choate, probably in mid-March, 1956, at either the Statler or the Mayflower Hotel, and he did not remember anyone else being present. He confirmed Choate's statement that he would not allow him to talk about the then pending legislation. Nothing was said about the Channel 5 case "even remotely or indirectly":

he *presumed* that Choate wanted merely to "put his best foot forward" as "everybody" tries to do, to "make a good impression" as being "a capable, responsible person," *though "he never said it in so many words."*

Charles Mills' version was that Choate asked him to arrange a luncheon meeting with McConnaughey, who had just been appointed, because he would like to "size up"—form an impression of—this new head of the Commission. The conversation at the Raleigh Hotel was only of a general, social nature but, while he said he had only a poor recollection of what transpired at the luncheon, he believed that Choate asked how long such proceedings usually took and as to what the general procedure would be after the Examiner made a ruling. He did not recall Joyce being present at the second luncheon, which he also arranged and which he placed at sometime in 1956, nor did he recall any discussion in reference to legislation. He thought that Choate said there had been a ruling by the Examiner and he would be interested in knowing when it might be reviewed and what the subsequent procedure would be, and there was then some conversation about procedure. Neither Choate nor McConnaughey had any recollection of this, and Mills frankly stated that he was not interested in the conversation and did not pay close attention to it. Even if, however, such inquires as to procedure were in fact made by Choate he could well say—as Othello to the signiors of Venice—

> "The very head and front of my offending
> Hath this extent, no more,"

for certainly by no stretch of the imagination could they be stigmatized as amounting to an attempt to influence McConnaughey with reference to his application.[1] What

[1] There has never been thought to be any impropriety in ex parte conversations with a judge in reference merely to non-controversial questions of procedure. Judges are frequently so consulted as a matter of course.

is of real importance is the statement of Mills—agreed to by all—that there was no discussion of the merits of the Channel 5 case.

From all of this testimony the Examiner finds the facts to have been that there were two luncheon meetings, Mills acting as the host on both occasions. That the first was in the winter of 1954-1955. That the conversation was purely social and the Channel 5 case was not discussed in any manner whatsoever. That Choate may have inquired as to the usual length of time of such proceedings and the procedure following a ruling by the hearing examiner. That the second luncheon was in March or April, 1956. That it was held at Choate's request for the purpose of presenting to McConnaughey a draft of the "Dempsey Amendment" and explaining its proposed effect on the legislation then being considered by the House Subcommittee on Interstate and Foreign Commerce. That Joyce was present in a purely personal capacity. That again the Channel 5 case was not even remotely referred to. That Choate made no representations at either luncheon as to the calibre of his people, nor attempted in any way to "impress" McConnaughey. That any question concerning procedure was mentioned casually if at all. That there was no discussion of the legislation or of the Dempsey Amendment because Chairman McConnaughey refused to allow it, and that only general, social conversation was indulged in.[2] Since, however, Choate had had in mind to bring up the subject an explanation in regard to it is in order.

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[2] The argument that McConnaughey should have made his lunches with Choate and Mills a matter of record and have notified the other parties in regard to them is, to say the least, wholly without merit in view of the fact that the luncheons did not involve any discussion of the Channel 5 case or even of the proposed general legislation on the subject of diversification. Judges are not required to record and to notify other parties in regard to any lunches or meetings they might have with a litigant or a lawyer in the case where no discussions took place there in reference to the case and only a social relation prevailed.

There then was, and for some time had been, considerable discussion in Congress, in the radio and television industry, in the press, in the Federal Communications Commission, and in the courts, as to whether, and to what extent, the question of diversification of ownership of media of mass communications should properly play a part in the consideration in comparative proceedings of the award of a radio or television license.[3] Should such an award be denied to newspapers and other institutions engaged in the dissemination of information? Was it against public policy to permit a concentration of control of mass communications? This was obviously an extremely important public question and one which seriously affected the entire press of the country. In 1952 a serious but abortive attempt had been made to include in amendments to the Communications Act a provision which would have prevented the Commission from discriminating against newspapers, radio stations, etc. by applying to them the so-called principle of "diversification." As early as the spring of 1954, shortly before the consolidation of the applications in the present case for comparative hearing, Senator Saltonstall, at Choate's suggestion, had written to then Chairman Hyde on the subject of the Commission's policy in that regard.[4] In the winter and early spring of 1956 hearings

[3] See article by G. E. and Rosemary D. Hale in 107 University of Pennsylvania Law Review 585, 598-602.

[4] Choate, who was justified in wanting to know whether newspapers were barred from receiving permits for television stations and whether his case was therefore hopeless from the start, wrote to Senator Saltonstall asking if he could give the matter his attention and, if possible, "put the Commission on record as being willing to consider the applications of newspapers for the remaining open channels at least with impartiality,"—in other words a statement as to its general policy. Saltonstall thereupon wrote to Chairman Hyde, calling attention to the Herald's interest and anxiety in the matter, but asking only that "all applicants be given a fair and equal opportunity," which he "was certain the Commission would do." Chairman Hyde promptly gave such an assurance, and furnished information to show that there was no predisposition of the Commission against newspaper applicants.

were had before a House Subcommittee of the Committee on Interstate and Foreign Commerce on the "Harris-Beamer" bills which provided that the Commission could not adopt any rule which would discriminate against applicants because of their interest in any medium primarily engaged in the gathering and dissemination of information, nor deny any application solely because of such interest. Naturally the entire newspaper industry was greatly in favor of the bills, and a representative of the American Newspaper Publishers Association testified in support of the proposed legislation. On the other hand Chairman McConnaughey voiced opposition to the bills on the ground that they were unnecessary because it was the Commission's policy to treat the question of diversification, not as controlling, but as only one of the many factors which it had to evaluate, and it never disqualified an applicant solely for the reason that it was engaged in the dissemination of news. McConnaughey also thought that some of the terms in the bills were vague and ambiguous.

Such, then, being the situation, the Herald-Traveler Corporation had its counsel, William J. Dempsey, prepare an amendment or substitute bill designed to cure the ambiguities to which Chairman McConnaughey referred in his testimony, but which also safeguarded the applicability of the antitrust laws. Senator Kennedy presented the amendment to the Subcommittee, and it was a draft of this amendment and supporting memorandum that Choate had intended to show McConnaughey at their lunch meeting in order that, if he found it satisfactory and would therefore withdraw his opposition to the legislation, there would be a better chance of its enactment. However, as previously stated, McConnaughey refused even to look at the draft much less discuss it, and the bills themselves ultimately failed of passage.

In accordance with the views expressed by the present Hearing Examiner with respect to similar activities of North Dade Video, Inc. in the case of the Miami Channel

10 award, it is not thought that there was any impropriety in the efforts of the Herald-Traveler Corporation to obtain legislation by Congress that would definitely prevent the refusal of a permit for a radio or television station solely because of the applicant being engaged in the dissemination of news. There was no reason why it could not seek, in conjunction with the newspaper world generally, the legislative establishment of a public policy governing the subject of the control of media of mass communications. It was therefore well within its rights in having Senator Kennedy present the amendment to the Congressional Subcommittee in order to secure the desired legislation, and it was equally in order for Choate to interview Chairman McConnaughey for the same general purpose, which would not, of course, have been within the jurisdictional scope of the Commission in the Channel 5 proceedings but only for action by Congress. It must be borne in mind that Choate's intended appeal to McConnaughey was not to be directed to him as a Commissioner in the Channel 5 case, but only because he had appeared and testified before the Subcommittee in opposition to the enactment of the legislation, and it was solely in his role as a hostile witness there that Choate sought to remove his objections and have him approve the Dempsey Amendment, just as he could or might have done in the case of any other person who had similarly tried to block the legislation in question. According to the testimony of General Counsel Warren E. Baker, members of the Commission appearing before Congressional Committees with respect to proposed legislation confined themselves to the general principles involved and avoided any application of those principles to pending quasi-judcial matters, and McConnaughey's appearance before the Committee was not a judicial act or in the performance of a judicial function but merely, of course, in the capacity of a witness, and, as such, his testimony was clearly subject to attack or to discussion by anyone who favored and supported the legislation, and Choate did not lose that right

merely because of the pending Herald application which might be affected thereby. However, *this is all academic*, for even if Choate's mere mental intention were to be regarded—contrary to the view here expressed—as in any degree improper, it never ripened into action since the draft of the amendment and the accompanying memorandum were not in fact shown to McConnaughey nor discussed with him.

From all of the testimony, therefore, the Examiner finds that neither at his luncheon meetings with Chairman McConnaughey nor on any other occasion did Choate make any culpable attempt to influence his vote in the Channel 5 proceedings nor did in fact exert any such influence. And while he may have had some casual social contacts, as at lunches, receptions, and the like, with other Commissioners and with men in public life generally, some of whom he knew intimately for many years, there is no evidence that he or any other representative of the Herald-Traveler Corporation ever asked or received from any of them any improper help in connection with the application of WHDH for the Channel 5 permit. Incidentally it may not be amiss to remark that mere normal social relations with public officials are not taboo, for they, like other human beings, are not required to live in ivory towers,—subject always, of course, to the fundamental condition that there be no attempt on the part of a litigant or applicant for some judicial or quasi-judicial favor to take advantage of such acquaintanceships or intimacies by using them for the advancement of his cause. It is only marked attention and unusual hospitality on the part of a lawyer or litigant to a judge that is reprehensible: Canon 3 of Professional Ethics of the American Bar Association. In the present case there was no such excessive hospitality on the part of Choate; indeed there was none at all, for both Choate and McConnaughey were the guests of Mills at both of the luncheons, which, incidentally, took place more than a year apart, and even the "return" courtesy of Choate's invita-

tion to the others to a Gridiron Club dinner was ultimately declined by McConnaughey because of a previous engagement. Nor was there anything secretive or sinister merely in the holding of these brief luncheon meetings, the real question being, of course, the nature and content of the conversation which occurred there, and as to that it must once again be repeated, for it goes to the very heart of the present issues, that there is not a shred of credible evidence that there was any attempt there on the part of Choate to present the merits of the Herald application, the qualifications of the Herald organization, or anything in derogation of the other applicants,—in short, nothing that either in law or codes of professional or judicial ethics could justifiably be regarded as impairing the validity or propriety of the award which was subsequently made by the Commission.

B. As to Massachusetts Bay Telecasters, Inc.

Forrester A. Clark—director and vice-president of Massachusetts Bay Telecasters,—either alone or together with another stockholder of the company, during the years 1954-1956 visited several persons in high public positions,—Henry Cabot Lodge, Sinclair Weeks, Robert Cutler, Senator Saltonstall, Leonard Hall, Representatives Bates and Curtis,—to tell them that there were rumors of political activity[5] on the part of other applicants, to urge "neutrality" on their part, and to seek their advice. Another stockholder wrote in the same vein to Representatives Martin and Wigglesworth, and still another saw Max Rabb. None of the persons thus interviewed was asked to contact, or did contact, any of the Commissioners, nor did any of them interfere in the procedings in any way. It is true that Clark gave Cutler a memorandum urging that a concentration of ownership of newspaper and television control should be avoided, and Cutler showed this memorandum to Sherman Adams, who, however, promptly called the

[5] The rumored political activity was not identified and there is no specific evidence in the record to show that it existed.

Chairman of the Commission and notified him that he could rest on the assurance that there would be no interference whatever from the White House; the memorandum, therefore, never reached any of the Commissioners.

Claiming that the rumors continued, Clark, in February, 1956, had a lunch meeting with Chairman McConnaughey at the Mayflower Hotel. He revealed the position of the Massachusetts Bay Telecasters as an applicant for the permit but told McConnaughey that all they wanted fair play according to the rules and that they themselves had no political affiliation of any kind. He denies that he tried to "show that they were responsible people" or that he "wanted to put his best foot forward," as McConnaughey, without further explanation, stated that he did, but he did call attention to some of the prominent members of his group in order to show, as he claimed, that it was not a political partisan organization. McConnaughey testified that he would not let Clark enter upon any of the Merits of the case, but did not think, in that connection, that what he said about the personnel of the Massachusetts Bay Telecasters was objectionable. Clark later wrote to McConnaughey urging him to read the Massachusetts Bay brief which had been filed in the proceedings; however he had previously suggested to him to read *all* the briefs.

Accepting Clark's testimony as true,—which the Hearing Examiner does,—it would thus seem that, while his activities were essentially directed toward making sure that no political or other improper influence could be successfully exerted by any of the other parties, he may have stepped somewhat out of bounds in the presentation he made to McConnaughey of the merits of his associates.

C. As to Allen B. DuMont Laboratories, Inc.

Shortly after McConnaughey became a member of the Commission on several later occasions Dr. Allen B. DuMont had lunch with him at the Raleigh Hotel. There was

no conversation at these meetings in regard to the Channel 5 case, but McConnaughey testified that DuMont, "as everybody else," was "trying to put his best foot forward," and "giving one to understand that he was a responsible individual," which seem to have been stock phrases with McConnaughey, probably meaning, as likewise in the case of Choate and of Clark, that the visitor, by his mere presence and demeanor, was seeking to create a good impression as to his personality. At any rate there was nothing that could be regarded as an attempt to exercise improper influence in the case.

D. As to Globe Newspaper Company.

Globe Newspaper Company was not an applicant in the Channel 5 proceedings and its only interest therein was to prevent an award of the permit to the subsidiary of the Herald-Traveler Corporation. The reason for this attitude on its part and the means which it ultimately employed in its support will be described more at length hereafter. Shortly after it heard, in December, 1956, that the initial decision of the Hearing Examiner was likely to be reversed and the permit granted to WHDH, William Davis Taylor, president of the company and publisher of its newspaper, and John S. Taylor, vice-president, treasurer, director, and assistant to the publisher, went to Washington and there called successively on Senator Saltonstall, Senator Kennedy, Congressmen Martin and McCormack, Max Rabb, Senator Payne, Senator Bridges, Sinclair Weeks, and Vice-President Nixon's Secretary. They also phoned Sherman Adams and wrote to President Eisenhower, and other representatives of the company contacted James Hagerty and Robert Cutler. The burden of the story of all of them was the evil of newspaper ownership of a television station and especially in a situation such as that in Boston where there were two competing newspapers of approximately equal strength and it was claimed that the granting of a

permit for such a station to one of them would give it an unfair advantage over the other.

None of those to whom the Taylors thus appealed saw any of the Commissioners on their behalf or gave them any help or encouragement beyond, in some instances, courteously making appointments for them with persons whom they desired to meet; they all refused to interfere in the case. Sherman Adams told them that the White House had nothing to do with the regulatory agencies, and the President's special counsel, Gerald D. Morgan, replied to their letter to the President to the same effect. They then started a round of visits to the Commissioners themselves,—Craven, Bartley, McConnaughey, Lee, Mack, Doerfer, and Hyde,—who, upon being told by the Taylors that they were not applicants listened briefly to their complaint. Chairman McConnaughey told them they had no rights and that there was nothing they could do in the matter. None of the Commissioners indicated how he had voted or intended to vote, nor expresed any opinion concerning the Channel 5 case.[6] A few weeks later the Globe Newspaper Company filed a petition to intervene, but as this was a

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[6] The contention that Clark's visit to McConnaughey and the visits of the Taylors to the Commissioners should have been made matters of record and the other parties notified scarcely warrants comment. Those visits were directed primarily, not against the "other parties," who would have been entirely sympathetic therewith, but only against WHDH, which, in the light of the final result, was not affected or harmed thereby. And that the Taylors, who were not parties and were acting without any authorized standing, chose to refer to two of the parties as worthy of the award and did not mention DuMont in that connection, likewise needs no discussion. The DuMont application was on the record and the Commission certainly did not need to be reminded of it by the Taylors but, on the contrary, showed, in its opinion, that it gave it full consideration with all the other applicants. How the failure of the Taylors to mention the DuMont application in their conversations can affect the award of the permit to WHDH is quite beyond comprehension.

matter of public record of which all parties in interest were notified and was in due course of the recognized and public processes of adjudication, it plays no part in this immediate inquiry but will be referred to in another connection hereafter.

Issue 1. Should any member of the Commission who participated have disqualified himself from voting in the proceedings before the Commission which resulted in the award of the construction permit for a television station on Channel 5 in Boston?

The answer to this question is in the negati[ve]. There is nothing in the testimony adduced at the hearing before the Examiner which would have justified, much less compelled, such a disqualification. As far as Chairman McConnaughey is concerned the facts are that none of the persons who met and spoke to him as hereinbefore stated—Choate, Clark, DuMont, the Taylors—was a friend or political sponsor or one to whom he was indebted for any gifts, loans or other favors; none of them had the slightest claim upon him; indeed they were all apparently mere strangers at the time of their interviews with him. Therefore, in participating and voting in the proceedings he was not torn between the path of duty and that of any personal obligation. Moreover, none of the applicants discussed, or was permitted by him to discuss, the merits of the Channel 5 case. He was not influenced by any of these visitors in any respect bearing on the award; there is nothing whatever to show that he gave their conversation any consideration in his ultimate decision; he was not placed in any embarrassing position that would or should have caused him to doubt whether he could honesty and impartially act as a judge in the proceedings or whether he should disqualify himself. He heard the oral argument and he read, the same as all the other Commissioners, so much of the record and briefs as was reasonably necessary or helpful to an understanding of the case and therefore presumably voted with full knowledge of the issues involved and the merits of

the rival contentions. Thus, on all counts, there was no reason for McConnaughey not participating; were it to be held otherwise, a litigant in any judicial proceeding, or even a person not a party, could bring about the disqualification of a judge and thereby secure the subsequent annulment of an award in favor of a party who, as here held in the case of the Herald, was not itself guilty of any disqualifying conduct, merely by visiting the judge and, perhaps even before he could be effectively stopped, making an improper appeal in regard to a prospective decision.[7]

What is thus true as to Chairman McConnaughey is equally true as to all the other Commissioners. Visited by the representatives of the Globe Newspaper Company they received them initially but gave scant heed or consideration to their complaint and expressed no opinion in regard to the merits of the Channel 5 case nor indicated how they intended to vote therein. Short of utter discourtesy to those gentlemen they could scarcely have done either more or less.

This brings us to a consideration of the somewhat voluminous testimony offered at the hearing in regard to action taken by McConnaughey in connection with an antitrust issue raised in the case, which action, it is contended, enters into the question of his disqualification. This contention is, in the opinion of the Examiner, wholly untenable. It has already been stated that, having received no satisfaction from the interviews of its representatives with certain public officials and with the Commissioners themselves, the Globe Newspaper Company, on January 30,

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[7] Thus, WHDH, having been granted a permit, cannot justifiably be deprived of it merely because a competitor and hostile non-party may have made ineffectual attacks on it outside the recognized and public processes of adjudication. The controlling question in every such case must be whether the successful applicant itself did anything so improper as to warrant the forfeiture of the grant which was made to it, not what other parties or non-parties may improperly have done in their efforts to defeat it.

1957, filed a petition with the Commission to intervene, and thereupon Greater Boston Television Corporation and Massachusetts Bay Telecasters also filed petitions to have the record reopened in order to permit of the introduction of evidence in support of the allegations in the Globe Newspaper Company's petition. Those allegations, with accompanying affidavits, were to the effect that the Herald-Traveler Corporation had used its radio station to give it an unfair competitive advantage; that it was proposing to operate the television station, if awarded to it, in the same manner; that it had uttered a threat to drive the Globe newspaper out of business; and that it had attempted to upset loan agreements of the Globe Newspaper Company made for the purpose of erecting a new plant,—all this in order to force a merger between the two companies and thereby eliminate their competition. To this petition an answer was filed by WHDH, asserting that the matters set forth in the petition were already fully canvassed in the evidentiary record, in the briefs, and in the oral argument before the Commission; the allegations of the petition were denied and counter-affidavits were filed.

Since an issue was thus raised involving a possible violation of the antitrust laws in the communications field, the General Counsel of the Commission, in accordance with long established and what would seem to be eminently proper and desirable practice, sent copies of the pleadings to the Antitrust Division of the Department of Justice, which, in pursuance of its obvious duty, promptly started an investigation to determine whether there was any violation of the law, either existing or threatened. *On March 28, 1957, Chairman McConnaughey, acting on behalf of the Commission, called the then Chief of the Antitrust Division, Victor R. Hansen,—not to inquire as to facts, of any, learned in the* investigation nor to obtain any legal opinion, but merely to ascertain the status of the investigation and whether the Department had any intention of commencing an antitrust action. Hansen's exact reply to the inquiry is

somewhat in dispute; in substance, however, it was that the evidence was conflicting and that the Department did not intend to start a suit unless further investigation should produce information that would warrant it, but that, since the matter was then before the Commission, it should appropriately be determined by that body in the first instance. Accordingly the Commission went ahead and a month later, on April 24, 1957, denied the petitions of Globe Newspaper Company Greater Boston Television Corporation, and Massachusetts Bay Telecasters. It pointed out in its opinion the lapse of time since the closing of the record, since the filing of the initial decision, and even since the final argument before the Commission, and that therefore the Globe Newspaper Company's petition was not timely and had to be dismissed; furthermore, that the actions of the Herald-Traveler Corporation complained of were spread out at length on the record and the new facts now presented added only a negligible amount to what was already before the Commission and nothing to the competitive picture; the instances of behavior referred to were magnified out of proportion and the charges were not satisfactorily supported. And in its opinion of the same date on the exceptions to the Hearing Examiner's award the Commission stated its conclusion that there was no showing of any practice on the part of the Herald-Traveler Corporation that was used to adverse effect upon any competitor nor of any intention to use a television license in such manner. On appeal, the Circuit Court approved the denial of the petitions, saying (Massachusetts Bay Telecasters v. Federal Communications Commission, 261 F. 2d 55, 60): "In view of the mass of evidence already in the record and the Commission's conclusion that no adequate justification for reopening had been shown, the Commission denied the petitions in the interests of administrative finality. We are persuaded that it has not been shown to have abused its discretion."

All of the proceedings thus described were obviously in accordance with recognized and public processes of adjudi-

cation. But it is contended that, for three alleged reasons, they involved improprieties on the part of Chairman McConnaughey that required his disqualification from voting.

The first of these charges is that he did not properly present to his fellow Commissioners the reply which he received from Hansen. Whether, even if this were entirely true, representations and discussions among the Commissions themselves would fall within the scope of the present inquiry to determine whether any Commissioner should have disqualified himself from voting is, to say the least, extremely doubtful. However, in the opinion of the Examiner, any inaccuracies in Chairman McConnaughey's statement were not only not intentional on his part but were of no material significance. The substance of Hansen's reply was that the evidence then in the possession of the Department did not warrant suit and the Commission itself ought to proceed to its decision then under consideration. It is true that he may have added that the investigation would continue,[8] whereas McConnaughey reported that he said that "as far as the Department of Justice was concerned the matter was closed," but whether the investigation was declared to be finally or only temporarily unproductive of results was, as hereinafter explained, wholly unimportant as far as the purpose of McConnaughey's inquiry was concerned. It is also true that, according to McConnaughey, Hansen said that "the matter could not even be dignified by the name of a complaint," whereas Hansen denies this, but; whether true or not is, at best, of no moment since Hansen admittedly did speak disparagingly of the Globe Newspaper Company's complaint as not, then at least, justifying the filing of a complaint by the Department, and whether he did or did not say it is emphatically as McConnaughey thought he did is likewise unimportant.

[8] A subsequent full field investigation by the F.B.I. apparently revealed nothing additional, with the result that the Antitrust Division finally discontinued all further investigation on January 10, 1958 and has not brought any suit under the antitrust laws.

The second charge urged against Chairman McConnaughey is that it was improper on his part even to have made the inquiry of the Antitrust Division and that the Commission should not have paid any attention to the reply, which, however, should have been recorded and the parties notified thereof. This contention is obviously based upon a misconception of the relations between the Commission and the Department of Justice in regard to questions arising under the antitrust laws and also of the nature and object of McConnaughey's inquiry. In United States v. Radio Corporation of America and National Broadcasting Company, Inc., 358 U.S. 334, 351, 352, the Supreme Court, explaining the applicable legislation in accord with previous rulings, declared that it was not the function of the Federal Communications Commission to pass on antitrust violations as such, nor has it any authority so to do, and, while it may properly give consideration to antitrust implications in determining the ultimate criterion of the "public interest, convenience and necessity," any decision it might make in any case before it would not prevent enforcement of the antitrust laws in federal courts or foreclose the Attorney General or any aggrieved private party from starting antitrust proceedings aimed at transactions which the Commission may have licensed. It was further held that although the Attorney General had the right to intervene in proceedings before the Commission where such an issue was or might be involved the failure to exercise such right would not bar the Government from subsequent action to enforce the antitrust laws.[9] It is obvious, therefore, that McCon-

[9] In answer to an inquiry from Senator Magnuson as to the relations between the Commission and the Department of Justice in the handling of antitrust issues, Chairman McConnaughey, in a letter of January 3, 1957, gave virtually the same explanation as did the Supreme Court in its opinion rendered two years later, namely, that the Commission need not wait upon action by the Department but could proceed with its own decision, which, however, would not "insulate a particular transaction from later enforcement by the Department of Justice under the antitrust laws."

naughey not only was justified but acted judiciously in inquiring of the Antitrust Division whether it intended to start an antitrust action, for, if it did, it certainly would have been impractical and ill-advised for the Commission to proceed to a decision which might be promptly nullified by the institution and result of such an action. McConnaughey did not inquire of Hansen, nor consult with him, as to any question of fact or law in issue; Hansen testified that he did not give, and was not asked to give, any opinion: and nothing learned in the investigation was imparted to McConnaughey, so that there was nothing in Hansen's reply to put upon the record or of which there was any duty or reason to infrom the parties. Since the Commission held that the Globe Newspaper Company's petition must be dismissed because not filed in proper time, and it being thus out of the case, the Commission gave full consideration to the record, and only to the record,[10] as it existed, and evidently concluded from all the evidence therein and after weighing all relevant factors that WHDH was, in their judgment, the applicant best qualified to promote "the public interest, convenience and necessity," which is the criterion established by the Communications Act for the grant of a permit. The Hearing Examiner finds nothing in all of this that Chairman McConnaughey did that was wrong, or that, for any reason whatever, required his disqualification from voting in the proceedings.

Finally it is contended that there should have been such a disqualification because McConnaughey is alleged to have consulted General Counsel with regard to the diversification and antitrust issues without notice and opportunity for all parties to participate. There is no basis for such a charge. According to the testimony the only conversation which Baker, then General Counsel, had with Chairman Mc-

[10] McConnaughey properly "did not consider Hansen's reply as relevant in any way to the Commission's judgment or appraisal of whatever antitrust issues the comparative proceedings posed."

Connaughey was in relation to a letter of Congressman Celler of March 27, 1957, inquiring about the liaison between the Commission and the Department of Justice in connection with the alleged violation of the antitrust laws by the Herald-Traveler Corporation. Under the rules of the Commission it is the function of General Counsel to prepare replies to Congressional inquiries of such a nature, and Baker embodied in the reply to Congressman Celler of April 15, 1957, the conversation between Hansen and McConnaughey as to which, at Baker's request and for that purpose, McConnaughey informed him. This was so far afield of the charge of "General Counsel making any additional presentation respecting the case," as scarcely to have warranted its mention. It is true that Chairman McConnaughey, while disclaiming any recollection that he himself ever discussed the antitrust issue with General Counsel, made the vague, general statement,—evidently not of his own knowledge,—that "the Commissioners probably did." But Baker, whose credibility is beyond question, emphatically denied that he ever discussed with McConnaughey or any of the other Commissioners any of the issues in the case, the petitions of the Globe Newspaper Company, Greater Boston Television Corporation and Massachusetts Bay Telecasters, the replies thereto, or the final decision; no Commissioner ever consulted with him or requested any opinion from him concerning any factual or legal question involved in the case.

In conclusion, therefore, as to the issue of disqualification assigned by the Commission for determination in these proceedings, the answer is that there is no reason disclosed in the present evidence why any member of the Commission who participated should have disqualified himself from voting in the Channel 5 case.

Issue 3—Did any party to the proceedings before the Commission which resulted in the award of the construction permit for Channel 5 in Boston directly or indirectly secure.

aid, confirm, ratify, or know of any misconduct or improprieties in connection with the proceedings?

All the actions of the parties to the proceedings before the Commission as hereinbefore discussed were by principals, not emissaries, and therefore the parties themselves would have been responsible for any misconduct or improprieties that might be committed, but in view of the facts herein found, the conclusions reached and order made, the question is moot.

Issue 4—In the light of the facts adduced upon the other issues was the grant of the construction permit for Channel 5 void ab initio or, if not, voidable and action should be taken to set it aside; was and is any of the applicants disqualified to receive a grant of its application; was the conduct of any applicant, if not of a disqualifying character, such as to reflect adversely upon such applicant from a comparative standpoint?

In view of the facts herein found it follows that there is no reason or justification for voiding or rescinding the grant of the permit as far as the issues herein involved are concerned and that the other questions embodied in this issue are therefore moot.[11]

In the light of the foregoing discussion of the testimony the Hearing Examiner makes the following

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[11] It may be stated as a passing observation that, in any event, the misconduct of an applicant cannot, in the opinion of the Examiner as expressed in the Miami Channel 10 case, work an *automatic* disqualification of the applicant as *a matter of law*. It would seem obvious that the seriousness of any such misconduct must be appraised by the Commission, and whether it was sufficiently grave to warrant disqualification or merely to weigh adversely upon the applicant from a comparative standpoint must be determined by the Commission as a *fact* in each case while giving consideration also to all other factors bearing on the question of the "public interest, convenience, and necessity." The various judicial statements on the subject in the reported cases mean, and can mean, nothing more.

FINDINGS OF FACT

1. None of the parties who were applicants for the grant of a construction permit for Channel 5 in Boston, improperly influenced or (with the exception of Massachusetts Bay Telecasters to the somewhat minor extent discussed in the foregoing opinion) attempted to influence Chairman McConnaughey or any other member of the Federal Communications Commission in private interviews or otherwise and not by the recognized and public processes of adjudication, in order to induce him or any of them to favor their own applications in the final decision.

2. Neither Chairman McConnaughey nor any other member of the Federal Communications Commission was guilty of any indiscretion, impropriety, misconduct, or illegality in connection with the proceedings which resulted in the award of the construction permit for Channel 5 in Boston.

3. Neither Chairman McConnaughey nor any other member of the Federal Communications Commission was rendered unable to participate and vote with freedom and impartiality in the said proceedings because of any indiscretion, impropriety, misconduct, or illegality on the part of him or any of them or any of the parties to the present proceedings.

and the following

CONCLUSIONS OF LAW

1. There was no reason, because of any facts herein found, for Chairman McConnaughey or any other member of the Federal Communications Commission to disqualify himself from participating and voting in the proceedings which resulted in the award of the construction permit for Channel 5 in Boston.

2. The fact that neither Chairman McConnaughey nor any other member of the Federal Communications Commission did disqualify himself, but, on the contrary, partici-

pated and voted in the said proceedings, did not impair the validity and propriety of the award made therein.

3. The award of the construction permit for Channel 5 in Boston made in the said proceedings is neither void ab initio nor voidable because of any facts herein found.

Accordingly, it is ordered, this 22nd day of September, 1959, that, unless an appeal to the Commission from this Initial Decision is taken by any of the parties or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of § 1.153 of the Rules, the grant of the construction permit for Channel 5 in Boston is neither void ab initio nor voidable, and therefore action should not be taken to set it aside because of any facts herein found.

HORACE STERN

Released: September 23, 1959 and effective 50 days thereafter, subject to the provisions of the Rule cited in the ordering clause above.

Answers to the General Counsel's Proposed Findings of Fact and Conclusions of Law

FINDINGS OF FACT

1 (a). Affirmed.

1 (b). Affirmed with the qualification that, the entire contents of the correspondence between Choate, Senator Saltonstall and Chairman Hyde not being set forth, a misleading impression is created by the proposed finding.

1 (c). Affirmed with the qualification that the reason for Choate wishing to meet McConnaughey was that, the latter having been just appointed to the important post of Chairman of the Commission, Choate wanted

to form an impression of him. Also with the qualification that part of the proposed finding is irrelevant.

1 (d). Affirmed.

1 (e). Affirmed.

1 (f). Affirmed with the qualification that a discussion of the proposed legislation and of McConnaughey's testimony in regard to it was, as explained in the Examiner's Opinion, wholly justified.

1 (g). Affirmed with the qualification that Choate's object was to show McConnaughey that the "Dempsey Amendment" would meet his objections to the proposed legislation. Also that the problem of diversification was an important, even a vital one for the entire press of the country. Also that every newspaper therefore had the right to discuss and press the enactment of the legislation, and the fact that WHDH had a pending application could not deprive it also of such right. Also that it was natural and not improper for Choate to have an interest of his own in the legislation in addition to his desire for the accomplishment of the general object by which all newspapers would be better protected in the future. Also that he had in fact been in communication with the General Manager of the ANPA, which was likewise actively engaged in seeking the enactment of the legislation.

1 (h). Refused because partly irrelevant and partly merely argumentative.

1 (i). Refused. The fact is, and the Examiner has so found, that Choate was immediately cut off and that there was therefore not the slightest discussion of the legislation or the Dempsey Amendment, and neither the draft of the latter nor the accompanying

memorandum was shown to McConnaughey. It is not a fact that there is any substantial evidence in the record to the contrary. It is not a fact that Choate discussed his application for a license for Channel 5 or recommended to McConnaughey the people in his organization or tried in any manner whatsoever to impress McConnaughey favorably on a personal basis as an applicant.

1 (j). Affirmed.

1 (k). Refused because irrelevant. Minor discrepancies in the testimony of Choate, as well as of McConnaughey and Mills, were not, in the opinion of the Examiner, the result of any deliberate falsification or evasion but due naturally to the lapse of time since the events in question took place. Moreover the alleged contradictions pointed out in the proposed finding are in regard to purely unimportant details not affecting the determination of the issues here involved.

2 (a). Affirmed.

2 (b). Affirmed with the qualification that the luncheon took place in the late 1954 or early 1955.

2 (c). Affirmed with the qualification that Mills, who admittedly paid little or no attention to the conversation testified that while he did not recollect McConnaughey cutting Choate off it might well have been. The important fact is that there was no discussion whatever at this luncheon in regard to the pending legislation, the question of diversification, or any of the merits of the Channel 5 case.

2 (d). Affirmed with the qualification that Mills testified only that procedure was discussed, not, as the proposed finding would vaguely imply, that the Channel 5 case itself was discussed "in some form or another."

2 (e). Refused because irrelevant.

3 (a). Affirmed.

3 (b). Affirmed.

3 (c). Affirmed with the qualification that the alleged rumors of political activities were not identified.

3 (d). Affirmed with the same qualification as in the answer to the preceding proposed finding.

3 (e). Affirmed with the same qualification as in the answer to proposed finding 3 (c).

3 (f). Affirmed with the same qualification as in the answer to proposed finding 3 (c). Also that there was no reason for Clark to have brought the alleged rumors to the attention of other Commissioners or any duty to inform the other applicants of his meeting with McConnaughey.

3 (g). Affirmed.

3 (h). Affirmed.

3 (i). Refused because there is not substantial evidence in the record that Clark referred to members of his group for any purpose other than to show their political diversity.

4 (a). Affirmed.

4 (b). Affirmed.

4 (c). Affirmed that McConnaughey so testified in part; any discrepancies therein are of merely minor importance.

4 (d). Affirmed that McConnaughey so testified in part, but his "thoughts", "feelings", and "beliefs" quoted are all irrelevant.

4 (e). Affirmed with the qualification that there was no duty on the part of McConnaughey to report to the other

parties or the other Commissioners his social lunch with Choate. Nor is it a fact that Choate attempted to discuss with him the Channel 5 case or that he discussed the pending legislation.

4 (f). Affirmed that McConnaughey so testified in part, but his "belief" as quoted is irrelevant.

4 (g). Affirmed that McConnaughey so testified in part, but his "thoughts", views, and "feelings" quoted are irrelevant. Nor was there any duty on his part to report his lunch with Clark to the other parties or the other Commissioners, or to bring Clark's letter of thanks to their attention.

4 (h). Refused because the "possibilities" referred to are irrelevant.

4 (i). Affirmed.

4 (j). Affirmed that McConnaughey so testified in part but the observations and comments thereon are not affirmed.

4 (k). Affirmed with the qualifications that McConnaughey did not inquire of Hansen as to any facts found or "results" of its antitrust investigation, but only as to its then "status". Also that there was no duty to make the conversation a part of the Channel 5 record or to bring it otherwise to the attention of the parties. Also that there is no evidence whatever that the Commission considered the contents of McConnaughey's memorandum in connection with their dismissal of the petitions, which dismissal was primarily based in the interest of administrative finality because of their untimeliness.

5 (a). Affirmed.

5 (b). Affirmed.

5 (c). Affirmed.

5 (d). Affirmed in general but not as to accuracy of details.

5 (e). Affirmed in general but not as to accuracy of details.

5 (f). Affirmed in general but not as to accuracy of details.

5 (g). Affirmed in general but not as to accuracy of details.

5 (h). Affirmed in general but not as to accuracy of details.

5 (i). Affirmed in general but not as to accuracy of details.

5 (j). Affirmed in general but not as to accuracy of details.

5 (k). Affirmed with the qualification that the alleged statement of Secretary Weeks is merely hearsay evidence and is not accepted by the Examiner as a fact.

5 (l). Affirmed with the qualification that the Commissioners merely allowed the Taylors briefly to state their complaint. Nor was there any reason why the visits of the Taylors should have been made a matter of record in the case or otherwise called to the attention of the parties.

5 (m). Affirmed.

6. Affirmed.

7. Affirmed.

CONCLUSIONS OF LAW

1. Refused.

2. Refused.

3. Refused.

4. Refused.

5. Refused.

6. Refused.

7. Refused.

8. Refused.

Answers to WHDH's Proposed Findings of Fact and Conclusions of Law

FINDINGS OF FACT

3. Affirmed.

4. Affirmed.

5. Affirmed.

6. Affirmed.

7. Affirmed with the qualification that the meeting was arranged by Mills at Choate's request.

8. Affirmed.

9. Affirmed with the qualification that the alleged attempt of Pearson and Allen is wholly irrelevant.

10. Affirmed with the qualification that the Chairman was not "responsible by law for legislative matters."

11. Affirmed.

12. Affirmed.

13. Affirmed.

14. Affirmed except as to the criticism of the attitude of General Counsel which is wholly unwarranted.

15. Refused because irrelevant.

16. Refused because irrelevant.

17. Refused because irrelevant.

18. Refused because irrelevant.

19. Affirmed.

20. Affirmed.

21. Affirmed with the qualification that the alleged rumors were not identified.

22. Affirmed.

23. Affirmed.

24. Affirmed.

25. Affirmed with the qualification that Clark also requested McConnaughey to read all the briefs.

26. Affirmed.

27. Affirmed.

28. Refused because merely argumentative.

29. Affirmed with the exception of the argumentative characterization of the truth or falsity of the affidavits of Choate and the Taylors.

30. Refused.

31. Refused.

32. Affirmed.

33. Refused.

34. Refused because irrelevant, the petition of Greater Boston having been dismissed.

35. Refused because irrelevant.

36. Refused because irrelevant.

37. Refused because irrelevant.

38. Refused because irrelevant.

39. Refused because irrelevant.

40. Refused because irrelevant.

41. Affirmed with the qualification that the Taylors planned to go to Washington to find out what they could about the rumored vote of the Commissioners but they apparently did not originally plan to interview the Commissioners.

42. Affirmed.

43. Affirmed.

44. Affirmed in general but not as to accuracy of details.

45. Affirmed in general but not as to accuracy of details.

46. Affirmed in general but not as to accuracy of details.

47. Affirmed.

48. Affirmed in general but not as to accuracy of details.

49. Affirmed in general but not as to accuracy of details.

50. Affirmed in general but not as to accuracy of details.

51. Affirmed in general but not as to accuracy of details.

52. Affirmed in general but not as to accuracy of details.

53. Affirmed.

54. Affirmed.

55. Refused.

56. Refused.

57. Refused because merely argumentative.

58. Refused because irrelevant.

59. Refused because irrelevant.

60. Refused because irrelevant.

61. Refused because irrelevant.

62. Affirmed. (See explanation in the Examiner's Opinion).

63. Refused because irrelevant.

64. Refused because irrelevant.

65. Refused because irrelevant.

66. Refused because irrelevant.

67. Refused because irrelevant.

68. Refused because irrelevant.

69. Refused because irrelevant.

70. Refused because irrelevant.

71. Affirmed.

72. Affirmed.

73. Affirmed.

74. Affirmed with the qualification that when General Counsel inquired of the Department of Justice as to whether it intended to intervene in the Channel 5 proceedings he was informed of the conversation between Hansen and McConnaughey and it was later that he prepared the letter to Celler.

75. Affirmed.

76. Affirmed.

77. Affirmed.

78. Refused because argumentative.

79. Refused because irrelevant.

80. Affirmed.

81. Refused because argumentative. (See explanation of the "conflict" in the Examiner's Opinion.)

82. Affirmed, except as to the argumentative portion of the proposed finding.

CONCLUSIONS OF LAW

83. Affirmed.

84. Affirmed.

Answers to Massachusetts Bay Telecasters' Proposed Findings of Fact and Conclusions of Law

FINDINGS OF FACT

1. Affirmed.
2. Affirmed with the qualification that the luncheon was in the late 1954 or early 1955.
3. Affirmed with the same qualification as to the date.
4. Affirmed with the same qualification as to the date.
5. Affirmed.
6. Refused because irrelevant.
7. Affirmed with the same qualification as to the date.
8. Affirmed with the same qualification as to the date.
9. Affirmed with the qualification that Choate introduced himself as such at the luncheon, and with the same qualification as to the date.
10. Affirmed with the same qualification as to the date.
11. Affirmed with the same qualification as to the date.
12. Affirmed with the same qualification as to the date.
13. Affirmed with the same qualification as to the date.
14. Affirmed with the qualification that this luncheon was in March or April, 1956.
15. Refused.
16. Affirmed with the same qualification as to the date.
17. Affirmed with the same qualification as to the date.
18. Affirmed with the same qualification as to the date.
19. Affirmed with the same qualification as to the date, and also that McConnaughey was ultimately unable to attend the dinner.

20. Affirmed.

21. Affirmed with the qualification that Joyce was not present in the capacity of attorney.

22. Refused. The meeting was arranged by Mills.

23. Affirmed with the qualification that the meeting was arranged by Mills.

24. Refused.

25. Refused.

26. Affirmed with the qualification that the words "at least" be omitted.

27. Refused.

28. Refused.

29. Refused.

30. Refused.

31. Refused.

32. Refused.

33. Refused.

34. Refused.

35. Refused as to the allegation that McConnaughey deliberately misrepresented Hansen's reply.

36. Refused.

37. Refused.

38. Refused because the quotations do not fairly represent the basic quality and content of McConnaughey's testimony. The Examiner has found the facts based both on this testimony and that of the other witnesses.

39. Affirmed with the qualification that the inquiry was as to the status of the investigation, not the facts in regard to the charges.

40. Refused.

41. Refused.

42. Refused because irrelevant.

43. Affirmed.

44. Refused.

45. Refused.

46. Refused.

47. Refused.

48. Refused.

49. Refused because,—while of no material importance,—the letter in question was written shortly *before* the applications were designated for hearing in a consolidated proceeding. Also because the entire contents of the letter are not set forth, thereby creating a misleading impression in regard to it.

50. Refused.

51. Refused because a misleading impression is created by the failure to set forth the entire contents of the letter.

52. Refused.

53. Refused.

54. Refused.

55. Refused.

56. Refused.

57. Refused.

58. Affirmed with the qualification that Choate's intention was to discuss the subject only as pertinent to the pending proposed legislation; and with the further qualification that his intention was never carried into execution.

59. Affirmed with the same qualifications as in the preceding answer.

60. Refused because irrelevant.

61. Affirmed with the same qualifications as in the answer to proposed finding 58.

62. Affirmed with the qualification that the implication that WHDH's legislative efforts were commenced only because of the unfavorable Initial Decision is not warranted.

63. Refused.

64. Refused.

65. Refused.

66. Refused.

67. Refused because irrelevant.

68. Affirmed.

69. Refused because irrelevant.

70. Refused because irrelevant.

71. Refused because irrelevant.

72. Refused because irrelevant.

73. Refused because irrelevant.

74. Refused because irrelevant.

75. Refused because unimportant, the actual number of such meetings having been found by the Examiner in a reconciliation of the testimony of the witnesses, much of which was naturally uncertain in detail but not intentionally "conflicting".

76. Refused because irrelevant.

77. Refused because irrelevant.

78. Refused because irrelevant.

79. Refused.

80. Affirmed with the qualification that the context shows the question to have been a very general one and without any intended reference to the luncheon meeting with McConnaughey.

81. Affirmed.

82. Refused.

83. Refused. Choate's purpose was clearly stated by him as a desire to show McConnaughey the Dempsey Amendment in order to remove some of his objections to the proposed legislation.

84. Affirmed with the same explanation as in the answer to the preceding proposed finding.

85. Refused because irrelevant, the "probability" not having eventuated.

86. Refused for the same reasons as in the answers to proposed findings 83 and 85.

87. Refused. Even if any such discrepancies existed they were wholly unimportant and irrelevant.

88. Refused because irrelevant and wholly unimportant.

89. Refused because, at best, unimportant and irrelevant.

90. Refused because unimportant and irrelevant.

91. Refused because irrelevant.

92. Refused.

93. Refused because there is no contradiction in his testimony concerning Secretary Weeks. Also because his testimony as to corresponding with Adams or Rabb is not accurately quoted; (he said he then had no "letters or writings" from those persons, obviously meaning none in his possession). Also because, at best, the testimony quoted is unimportant and irrele-

vant; the conversations with the persons mentioned were mere friendly, social inquiries on their part as to the satus of the case, no help having been asked of those persons and no contact resulting between them and the Commissioners.

94. Refused because Clark acted throughout with the advice and consent of the Board of the Massachusetts Bay Telecasters.

95. Affirmed.

96. Affirmed.

97. Affirmed.

98. Affirmed with the qualification that the alleged political activities were not identified.

99. Affirmed.

100. Affirmed with the same qualification as in the answer to proposed finding 98.

101. Affirmed.

102. Affirmed.

103. Affirmed with the same qualification as in the answer to proposed finding 98.

104. Affirmed.

105. Affirmed with the qualification that the memorandum also contained a laudation of Massachusetts Bay Telecasters' stockholders and an argument in favor of diversification.

106. Affirmed.

107. Affirmed.

108. Affirmed with the same qualification as in the answer to proposed finding 105.

109. Affirmed.

110. Affirmed with the same qualification as in the answer to proposed finding 98.

111. Affirmed with the same qualification as in the answer to proposed finding 98.

112. Affirmed with the same qualification as in the answer to proposed finding 98.

113. Affirmed.

114. Affirmed.

115. Affirmed.

116. Affirmed.

117. Affirmed.

118. Affirmed with the qualification that Clark presented the names of some of the prominent stockholders of Massachusetts Bay Telecasters for the purpose, as he claimed, to impress McConnaughey with their political diversity.

119. Affirmed.

120. Affirmed.

121. Affirmed with the same qualification as in the answer to proposed finding 118.

122. Affirmed with the same qualification as in the answer to proposed finding 118.

123. Affirmed that Clark so testified as to his purpose.

124. Refused because what Clark thought is irrelevant.

125. Refused.

126. Refused because what Clark's intention was is irrelevant.

127. Refused because what Clark's intention was is irrelevant.

128. Affirmed with the same qualification as in the answer to proposed finding 118.

129. Affirmed with the same qualification as in the answer to proposed finding 118.

130. Refused but, in the opinion of the Examiner, while Clark went somewhat beyond strict propriety his transgression was not a very serious one.

131. Affirmed.

132. Affirmed.

133. Affirmed.

134. Affirmed with the same qualification as in the answers to proposed findings 105 and 118.

135. This proposed finding is apparently incorrectly stated.

136. Refused. Any such "discussions" were with intimates, were merely social and casual in nature, and did not include any appeals for aid on behalf of the WHDH application.

137. Affirmed with the qualification that the presentations made by the Taylors were with at least subsequent knowledge of the President of Massachusetts Bay Telecasters, although they cannot be said to have been secured or aided by him.

138. Refused.

139. This proposed finding involves a hypothetical and presently irrelevant question.

CONCLUSIONS OF LAW

1. Affirmed.

2. Refused.

3. Refused.

4. Refused.

5. Refused.

6. This proposed finding involves a hypothetical and presently irrelevant question

Answers to Allen B. DuMont Laboratories' Proposed Findings of Fact and Conclusions of Law

FINDINGS OF FACT

12. Affirmed.

13. Affirmed with the qualification that Choate did *not* admit that they discussed the question of discrimination against the newspapers.* Also that Choate's remarks and inquiries were solely as to procedure. Also that the references to McConnaughey's knowledge of political affiliations are irrelevant and not wararnted by any evidence. Also that the evidence is clear that there was no discussion of the merits of the Channel 5 case. Also that there was no duty to report the luncheon to the other Commissioners or the other parties.

14. Refused because merely argumentative, and because Choate did have communication with the General Manager of the ANPA.

15. Affirmed with the qualification that Choate's thoughts are irrelevant.

16. Affirmed with the qualification that any conversations Choate had with other officials were merely casual and social and that he neither requested nor was given any help by them or any of them for his application. Also that the contents of the letters of Choate to Senator Saltonstall and of the latter to Chairman

* The "*We* discussed" (Tr. 3595) is obviously a mere typographical error for "*It* discussed" (i.e. the *memorandum* discussed), as clearly shown both by the context and by all the other testimony.

Hyde and not fully stated, and that the references to Secretary Weeks are all irrelevant.

17. Refused because irrelevant.

18. Refused because irrelevant, and because Choate's conversations with the persons mentioned were purely casual and social, no aid in reference to the case being asked or given, nor any contact occurring between them or any of them and the Commissioners. Also because the political implications are irrelevant and unwarranted.

19. Affirmed with the qualification that the characterization of Joyce as a lobbyist is irrelevant and that Joyce did not participate in the conversation at the luncheon.

20. Refused because irrelevant.

21. Refused because irrelevant.

22. Refused because irrelevant.

23. Affirmed with the qualification that the alleged rumors as to political activities are not identified.

24. Affirmed.

25. Affirmed with the qualification that the contents of the memorandum are unimportant in view of the fact that it never came to the attention of any of the Commissioners.

26. Affirmed with the qualification that Clark had requested McConnaughey to read *all* the briefs. Also that McConnaughey did interrupt Clark in any attempt to discuss what he considered the merits of the case.

27. Refused because irrelevant and because the political implications are wholly unwarranted.

28. Affirmed with the qualification that there was no duty to report to the Commission the lunch with Clark.

Also that it is not always required of judges to read each and every words of records and briefs.

29. Refused because irrelevant.

30. Affirmed with the qualification that the Greater Boston and Massachusetts Bay groups had only general information as to the Taylors' plan to visit Washington but not that they would interview the Commissioners.

31. Affirmed.

32. Affirmed with the qualification that the suggestion of the Taylors, who were not themselves parties in the case, that the Greater Boston and Massachusetts Bay applicants would be worthy recipients of the award was of no importance in the case, as pointed out in the Examiner's Opinion.

33. Refused because irrelevant.

34. Affirmed.

35. Refused because largely irrelevant.

36. Refused because largely irrelevant.

37. Refused because irrelevant.

38. Affirmed in general but not as to accuracy of details.

39. Affirmed in general but not as to accuracy of details.

40. Affirmed in general but not as to accuracy of details.

41. Affirmed in general but not as to accuracy of details.

42. Affirmed in general but not as to accuracy of details.

43. Affirmed in general but not as to accuracy of details.

44. Affirmed in general but not as to accuracy of details.

45. Refused because irrelevant.

46. Affirmed.

47. Affirmed with the qualification that McConnaughey inquired only as to the *status* of the investigation by the Department of Justice. Also that there was no requirement or duty whatever to inform the parties in regard to such inquiry. Also that no opinion of the Department was sought or obtained by McConnaughey, nor were any facts learned in the investigation reported to him.

48. Affirmed with the qualification that the "conflict" between Hansen's and McConnaughey's versions of their conversation is explained in the Examiner's Opinion. Also that the matters referred to in the proposed finding as to Hansen's meetings with Choate and his communications and meetings with others are irrelevant.

49. Affirmed.

50. Refused because irrelevant.

51. Affirmed.

52. Affirmed.

53. Refused because irrelevant.

CONCLUSIONS OF LAW

1. Refused.

2. Refused.

3. Refused.

4. Refused.

5. Refused.

Answers to Globe Newspaper Company's Proposed Findings of Fact and Conclusions of Law

FINDINGS OF FACT

1. Affirmed.
2. Affirmed.
3. Refused.
4. Affirmed.
5. Refused because irrelevant and as to the claimed "inference".
6. Affirmed with the qualification that there was only one such luncheon meeting during the period specified.
7. Affirmed with the qualification that the luncheon was held after McConnaughey had testified concerning the proposed amendments to the Communications Act.
8. Affirmed.
9. Affirmed.
10. Affirmed with the qualification that there is no evidence as to what McConnaughey knew of the Hearing Examiner's opinion. Also that this was the same luncheon as referred to in proposed findings 6 and 7.
11. Affirmed with the qualification that the statements as to Joyce are wholly irrelevant. Also that there was no reason whatever to invite other counsel to the luncheon.
12. Refused.
13. Refused.
14. Affirmed.
15. Affirmed with the qualification that Clark did not seek to impress McConnaughey with his capabilities.

16. Affirmed with the qualification that Clark had also asked McConnaughey to read *all* the briefs.

17. Affirmed with the qualification that the Taylors were generally warned to state briefly their complaint.

18. Refused as to the statement that Choate made the alleged threat.

19. Refused because merely argumentative.

20. Affirmed.

21. Refused.

22. Refused.

23. Refused.

24. Refused.

25. Refused.

26. Refused because merely argumentative.

27. Refused.

28. Refused.

29. Affirmed.

CONCLUSIONS OF LAW

1. Refused.

2. Refused.

HORACE STERN
Horace Stern
Hearing Examiner
Federal Communications Commission

Dated: September 29, 1959
Released: September 30, 1959

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 13,896
Case No. 13,899

* * * * * * * * *

Further Report of Progress

Pursuant to the order of the Court of February 10, 1959 in the above-entitled action, the Federal Communications Commission files herewith its Further Report of Progress.

Since the Commission's prior Report herein, dated January 29, 1959, to which reference is now made, hearings were held before Judge Horace Stern, sitting as a Special Commission Hearing Examiner from February 16 to 20, 1959, on February 24 and 25, 1959 and on March 9, 1959. The record was closed on March 23, 1959, and Briefs were filed by the parties on or before July 24, 1959.

An Initial Decision was released September 23, 1959 by Judge Stern which concluded that there was no reason for Chairman McConnaughey or any other member of the Commission to have disqualified himself from participating or voting in the proceedings resulting in the award of the permit for Channel 5 in Boston; that the fact that said members of the Commission participated and voted in the proceedings did not impair the validity and propriety thereof; and that the award of the permit was neither void *ab initio* nor voidable. Accordingly, it was concluded by the Examiner that action should not be taken to set aside the Commission's grant to WHDH, Inc. Thereafter, between the period from October 22 to November 23, 1959, exceptions to the Initial Decision were filed by Massachusetts Bay Telecasters, Greater Boston Television Corporation, and the Department of Justice; a "Statement In Lieu of Exceptions" was filed by the Commission's Office of General Counsel; and a Reply to the foregoing exceptions was filed by WHDH.

Oral argument on these exceptions to the Initial Decision, was held before the Commission *en banc*, on April 22, 1960 in which all parties participated. The matter is now awaiting decision by the Commission.

Respectfully submitted,

Edgar W. Holtz
Associate General Counsel

Max D. Paglin
Assistant General Counsel

James T. Brennan
Counsel

June 20, 1960

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

* * * * * * * * * *

Decision

By the Commission: Commissioner Craven absent

PRELIMINARY STATEMENT

1. On April 25, 1957, the Commission released a decision (22 FCC 761) resolving a comparative hearing for a new television station on Channel 5, Boston, Massachusetts in favor of WHDH, Inc. and denying the competing applications of Greater Boston Television Corp.; Massachusetts Bay Telecasters, Inc.; and Allen B. DuMont Laboratories, Inc. Appeals to the United States Court of Appeals for the District of Columbia Circuit were filed by Greater Boston and Massachusetts Bay, and on July 31, 1958 that court released its decision affirming the Commission on the basis of the record on which the Commission had decided the case but remanding for inquiry into factors not in the original record.

2. The Court noted that, subsequent to the Commission's disposition of the proceeding, testimony by a member of the Commission before the House Subcommittee on Legislative Oversight indicated that various individuals connected with some of the parties to the proceeding had conferred with him with reference to the case while the matter was still under consideration by the Commission. In light of this testimony the Court remanded the case to the Commission with direction to make findings of fact on the following issues:

> "Whether or not any member of the Commission should have disqualified himself in the present case;
>
> "Whether any person or persons influenced or attempted to influence any member of the Commission in any manner whatsoever except by the recognized and public process of adjudication . . . , and, if so the full facts and circumstances;
>
> "Whether any party to the proceeding before the Commission directly or indirectly secured, aided, confirmed or ratified, or knew of any misconduct which may be found by the Commission to have occurred;
>
> "Whether or not in the light of such findings, the grant of a permit for Channel 5, Boston was void *ab initio* and if not, is voidable and action should be taken to set it aside, and whether any one applicant or more than one may have been disqualified to receive a grant of its application; and
>
> "Whether the conduct of any applicant if not of a disqualifying character, has been such as to reflect adversely upon such applicant from a comparative standpoint."

3. The Court indicated that the Commission's findings and conclusions on the specified issues should form the basis of a "report" which would "supplement the record upon which [the] appeal had so far been based." However, the Court observed that "it is to be understood that it is for the Commission initially to determine, subject to review in usual course, the competence of its individual members to

have participated in the award, but with appropriate findings with respect to its ultimate conclusions. We deem it the Commission's proper duty and function to determine the basic qualifications of each of the four named parties . . ." The Commission construes this as a warrant, in the event the hearings on remand shall have disclosed events bearing materially on the original disposition of the case, to order such further proceedings as may be necessary in order that our "report" to the Court will reflect the Commission's views as to the proper ultimate disposition of the matter.[1]

4. Pursuant to the remand, the Commission designated the matter for hearing on issues modeled on those specified by the Court. WHDH, Inc.; Greater Boston Television Corp.; Massachusetts Bay Telecasters, Inc.; Allen B. DuMont Laboratories, Inc.; General Counsel of the Commission; Broadcast Bureau of the Commission; Attorney General of the United States; and, with respect to Issue 1, Globe Newspaper Company, intervenor, appeared at the hearing before Hearing Examiner, Horace Stern, who on September 23, 1959 released an Initial Decision which would affirm the Commission's grant to WHDH, Inc. Exceptions to the Initial Decision together with supporting briefs was filed by Massachusetts Bay; Greater Boston; the Attorney General of the United States; and the Commission's General Counsel. WHDH filed a brief in reply to the exceptions. Our rulings on the specific exceptions are attached hereto as Appendix A.

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[1] This construction is based on 5 USC 1037(c) and the fact that the Court equated its action in this case with its similar action in *Eastern Airlines, Inc.* v. *FCC*, 258 F2 .18, in which case by Order of May 12, 1958 the Court stated that it did not intend that the Commission act merely as a "special master" for the court, and did contemplate that the further proceedings ordered by the Court m ht result in a Commission Order modifying its original decision.

FINDINGS OF FACT

WHDH

5. Originally this proceeding involved a comparison of the applications of WHDH, Inc.; Greater Boston Television Corp.; Massachusetts Bay Telecasters, Inc.; Allen B. DuMont Laboratories, Inc.; Columbia Broadcasting System; and Post Publishing Company.[2] In the Spring of 1954, shortly before the consolidation of the applications for hearing, Senator Saltonstall, at the behest of Robert B. Choate, Director and Vice-president of the Boston Herald-Traveler Corporation, publisher and editor of the Boston Herald and Traveler newspapers and president of WHDH, Inc., wrote to the Chairman of the Commission stating that the Herald Traveler was concerned with the Commission's diversification polic[3] as it applied to newspapers, and asked that "all applicants be given a fair and equal opportunity." In the letter no preference for any of the applicants was urged.

6. On October 4, 1954 George C. McConnaughey commenced his service as Chairman of the Commission. The evidence in this proceeding is concerned in large part with certain conversations held with Mr. McConnaughey by officers of two of the applicant corporations. The Examiner noted, as do we, certain minor discrepancies in the testimony of the witnesses as to details of the events which transpired. He, having an opportunity to observe the demeanor of the witnesses and to evaluate their testimony in the light of his wide judicial experience, expressed the view that all of them were "entirely honest and sincere," and reconciled their testimony into his findings of fact. Our ex-

[2] The applications of CBS and Post were dismissed prior to the release of the Commission's decision of April 24, 1957.

[3] It is the Commission's policy to encourage the diversification of ownership of the media of mass communications, and the effect of a grant on such diversification is one factor in the evaluation of applicants competing for a facility.

amination of the cold record furnishes no cause to disturb the Examiner's basic findings as to the honesty of the witnesses, and we attribute such discrepancies as appear to confusion as to the meaning of questions; to legitimate failure of exact recollection or to improper phraseology in spontaneous answers. However, as hereinafter noted, while we accept the honesty of the testimony so far as it went, we do not believe that all of the witnesses disclosed fully their actions and motives.

7. In late 1954 or early 1955 Mr. Charles F. Mills, a friend of Choate who had previously served with McConnaughey on the Renegotiation Board, arranged a luncheon meeting for himself, Choate and McConnaughey, who had not theretofore met.[4] Choate told Mills that his purpose in attending this luncheon was to "size up" or form an impression of the new Chairman. At the luncheon, which took place at a Washington hotel, Choate identified himself as an applicant for a permit. Although there was no discussion of the Boston case which was then before the Commission's Examiner for hearing, Choate asked how long comparative proceedings took, and what the general procedure was after an Examiner made his ruling. Mr. McConnaughey did not recall having attended this luncheon.

8. In March or April of 1956 a second luncheon took place attended by McConnaughey, Choate, Mills and Thomas M. Joyce, a lawyer for the Herald-Traveler Corporation who did not, however, attend the luncheon in that capacity. This meeting was some three months after the release of the Examiner's Initial Decision favoring Greater Boston and some six months prior to the oral argument on the exceptions to that Initial Decision. Choate requested the luncheon for the purpose of discussing legislation with Mr. McConnaughey, although prior to the meeting he did not

[4] There is a conflict of testimony as to whether Choate or Mills first suggested the luncheon, each recalling it to have been the other's idea but each conceding that his recollection on this point may be faulty.

specify what legislation he wished to discuss. At the luncheon there was no conversation on the merits of the Channel 5 case as such, but Choate had in his possession a draft of the "Dempsey Amendment"[5] which he intended to present to Mr. McConnaughey in the hope of swaying the Chairman's opposition to the then pending Harris-Beamer bills. However, when Choate attempted to present the draft to McConnaughey the latter refused to accept it or to permit discussion of the matter. Therefore, only conversation of a social nature prevailed at the luncheon.

9. The only other encounters between Choate and McConnaughey have been at large social gatherings which both attended but not as members of the same party.[6] Although there is evidence of a series of telephone calls between Choate and Mills in January of 1956 (neither gentleman could recall the subject matter of those calls), and there is also some difference in the recollection of the witnesses as to the details of the luncheons they attended, we could not, on the basis of such evidence conclude as urged by certain of the parties that more than two luncheons occurred without basing such conclusion on mere speculation and conjecture.

Massachusetts Bay

10. During the years 1954-56 certain officers and stockholders of Massachusetts Bay, including Forrester A. Clark, director and vice-president, communicated with prominent political figures in Washington, to advise them that there

[5] At that time there was pending before the House Subcommittee of the Committee on Interstate and Foreign Commerce the "Harris-Beamer" bills which would have limited the Commission in the application of its policy encouraging the diversification of the ownership of mass media of communication. Chairman McConnaughey had testified in opposition to the bills and William J. Dempsey, the Herald-Traveler's counsel had prepared the "Dempsey Amendment" designed to cure some of the defects objected to in McConnaughey's testimony. The diversification criterion was of patent comparative significance in the pending Channel 5 case.

[6] Choate extended an invitation to McConnaughey to attend a Gridiron Dinner which Mr. McConnaughey ultimately declined.

were rumors of "political activity"[7] on the part of other applicants and to urge their neutrality. However, none of the persons contacted were asked to or did approach any Commissioner with the exception of Sherman Adams whose only act was to call the Chairman of the Commission and advise him that there would be no interference whatever from the White House.

11. In February of 1956 Clark arranged a luncheon meeting with McConnaughey whereat he told the Chairman that Massachusetts Bay had no political affiliation of any kind and was only seeking fair play under the rules governing comparative hearing. In the course of this conversation, purportedly for the purpose of showing that all shades of political opinion were represented in Massachusetts Bay, Clark told McConnaughey that Arthur Fiedler, Dom DiMaggio and John P. Marquant were stockholders. While these gentlemen all enjoy national reputations in their respective fields, Mr. Clark was not certain of the political affiliation of any of them nor did he suggest why Mr. McConnaughey might have been expected to be so aware. There was no other conversation which might be deemed as going to the merits of the case.

DuMont

12. Subsequent to Mr. McConnaughey's appointment as Chairman of the Commission he lunched on several occasions with Dr. Allen B. DuMont. Although McConnaughey had the impression that DuMont by his presence and demeanor sought to demonstrate that he was the sort of a responsible individual who might be expected to head a reliable organization,[8] the conversation was confined to mat-

[7] The "political activity" is not identified in the record, nor is there any evidence presented to substantiate the rumors.

[8] McConnaughey held the same view as to the motivation of all the parties to the case with whom he lunched. He did not regard their conduct as culpable, nor did he believe himself, in fact, influenced by such subtleties.

ters of industry-wide interest on which Dr. DuMont is regarded as an authority, and did not concern the Channel 5 case.

Greater Boston

13. The record contains no evidence of any *ex parte* contacts of any kind on the part of Greater Boston.

Globe Newspaper Company

14. Globe Newspaper Company was not an applicant in the Channel 5 proceedings and its only interest therein was to prevent an award to WHDH, a subsidiary of its competitor in the newspaper publishing business in Boston. In pursuit of this objective, William Davis Taylor and John S. Taylor, president and vice-president, respectively, went to Washington in December of 1956 and called on a number of prominent political figures. The burden of their argument was that newspaper ownership of a television station in a community such as Boston, where there were two competing newspapers of approximately equal strength, would give an unfair competitive advantage to that paper which had the station. All of the individuals whom the Taylors saw refused to intervene in the case, and none contacted any Commissioner on their behalf or rendered any assistance beyond, in some instances, arranging appointments with persons they desired to meet.

15. The Taylors then made calls on each of the Commissioners who, on being told by the Taylors that they were not applicants listened briefly to their complaint. Chairman McConnaughey told them that they had no right to be heard and there was nothing they could do in the matter, and none of the Commissioners indicated how he had voted or intended to vote or expressed any opinion concerning the Channel 5 case.

16. On January 30, 1957 Globe filed a petition to intervene, and subsequently Greater Boston and Massachusetts

Bay filed petitions to have the record reopened to permit the introduction of evidence in support of the allegations contained in Globe's petition to intervene. These allegations where to the effect that the Herald-Traveler Corporation had used its radio station to give it an unfair competitive advantage; that it proposed to operate the television station it sought in the same manner; that it had threatened to drive Globe out of business; and that it had attempted to upset loan agreements Globe had made for the erection of a new plant; all for the purpose of forcing a merger between the two companies and thereby eliminating their competition. WHDH opposed the petition, denying the allegations and asserting that they were already fully canvassed in the evidentiary record.

17. Since an issue was raised involving a possible violation of the antitrust laws in the communication field, the General Counsel of the Commission in accordance with long established practice, sent copies of the pleadings to the Antitrust Division of the Department of Justice which promptly started an investigation. On March 28, 1957, Chairman McConnaughey, acting on behalf of the Commission, called the then Chief of the Antitrust Division, Victor R. Hanson, not to inquire as to the facts developed in the investigation or to obtain a legal opinion, but merely to ascertain the status of the investigation and whether Justice intended to commence an antitrust action. While there is some conflict in the record as to how Mr. Hanson may have phrased his reply, its essence was that on the basis of the investigation Hanson would not recommend that Justice initiate suit at that time, and the Commission should determine the matter in the first instance. On April 24, 1957, the Commission denied the petitions of Globe, Greater Boston and Massachusetts Bay.[9]

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[9] The Court concluded that the denial of the petitions was within the discretion of the Commission.

Conclusions

1. The object of this proceeding is to determine whether the grant to WHDH is void or voidable and, if so, the status of the parties for the purpose of such further proceedings as may be appropriate.

2. Patently, in determining whether the grant is void *ab initio* or voidable we are concerned only with the actions by or attributable to the grantee, for it would manifestly be improper to penalize an innocent grantee for the conduct of its competitors. If the evidence indicates that the grant was actually obtained by improper means its very foundation would be destroyed and it would, in our view, be void *ab initio*. If, on the other hand, the evidence indicates that the grantee attempted to exert improper influence but that such attempt did not contribute to the award, the basic foundation of the grant would be unimpaired but a question would be raised as to whether the integrity of the Commission's processes had not been jeopardized requiring the voiding of the grant. In the event that the foregoing tests reveal the grant to be void *ab initio* or voidable a comparative reevaluation of the applicants would be required. If the record has disclosed that any party attempted improperly to influence the Commission's decision, such a finding at the very least, must reflect adversely on such party and on its qualifications as a licensee. The circumstances surrounding such attempt would determine whether the party was disqualified as an applicant or merely suffered a demerit in the overall comparative balance.

3. We turn first to the activities of Robert Choate of WHDH. The record indicates that Choate and McConnaughey were unacquainted in the fall of 1954 when Mr. McConnaughey was appointed to the Commission. Shortly thereafter Choate remedied that situation by arranging through a mutual friend to meet the new Chairman for lunch. While there was no attempt to discuss the merits of the Boston case then pending before the Commission's

Hearing Examiner, Choate was identified as an applicant in Boston and there was some discussion of comparative proceedings in general. Subsequently, Choate attempted to profit by the acquaintance thus established by again meeting McConnaughey for lunch with a view toward presenting the Chairman with a brief on proposed legislation dealing with the subject matter of a key issue in the Boston case.

4. No other contacts were made on behalf of WHDH,[10] and on such evidence we do not hold the grant to be void *ab initio*. Mr. McConnaughey did not even recall the first meeting and he refused to accept or read the brief tendered by Choate at the second luncheon. Under such circumstances it would be unrealistic to conclude that he was influenced by Choate's contacts or that the grant was actually secured as a result of improper activities.

5. However, we do conclude that Choate demonstrated an attempted pattern of influence. He indicates that his reason for the initial meeting with McConnaughey was to "size up" the new Chairman but, accepting that as true as far as it goes, it does not appear to be a full disclosure of his motives. While the Herald-Traveler had a legitimate interest in the views of the new Chairman of the agency regulating its radio station and the television station it soon hoped to have, in the normal course of events its contacts with the Commission would be conducted through its professional representatives and its appraisal of the individual Commissioners would be formulated from the opinions of these gentlemen. The record contains no persuasive explanation of why Choate felt it necessary to seek a personal relationship with McConnaughey, and we conclude that his reason was to afford the Chairman an opportunity to "size him up," that is to demonstrate by his

[10] We do not deem the sending of a routine letter by a member of Congress without urging any favoritism on the Commission as being of sufficient materiality to warrant discussion in these conclusions.

demeanor and presence that he was a responsible man representing responsible interests who merited favorable consideration of their application to conduct an operation in the public interest.

6. This view of Choate's motive in arranging the first luncheon is buttressed by the fact of the second luncheon and its admitted purpose of providing an opportunity to present McConnaughey with a brief on the "Dempsey amendment." While WHDH undoubtedly had a right to express its views to the Commission on communications legislation concerning it, its attempted method of presentation must be judged in the light of the circumstances then prevailing. It could not have escaped Choate's attention that the subject of the legislation was an important issue in the pending adjudicatory proceeding, nor could he have believed that McConnaughey might read such a brief without perceiving the pertinence of its arguments to the disposition of the Boston case. If he felt it necessary to present such a brief to the Commission at that time he must be presumed to have been aware of the relevance of the brief to the pending case, and, if he wished to escape the stigma of *ex parte* representation, the presentation should have been in such form as would afford his opponents an opportunity to make such reply as they might deem appropriate. Further, there is no persuasive explanation of why Choate, who is not shown to be a specialist in communications law, should consider himself, rather than the draftsman of the proposed legislation or some other experienced counsel, to be the proper person to present a brief on so technical and complex a subject: That McConnaughey did not accept and, therefore, could not have been influenced by the brief is irrelevant to the fact that Choate attempted, in effect, to influence the outcome of the case by presenting argument on a portion thereof to a member of the Commission *ex parte*.

7. The very attempt to establish such a pattern of influence does violence to the integrity of the Commission's processes. Such an attack on the integrity of the processes

of any adjudicatory body brings into play its inherent right to protect such processes, and one of the remedial measures available, is its discretion, in the voiding of any previous action that may have been tainted by such attempt. The facts revealed on this record persuade us that the Commission's processes can best be protected in this instance by exercising our discretion to void the grant to WHDH.

8. It follows that we must now determine our ultimate disposition of the construction permit for Channel 5 in Boston, and the role, if any, WHDH should play in such disposition. There is no question that the attempted pattern of influence disclosed on this record reflects adversely on WHDH, but we do not believe in light of all the circumstances that the public interest would be best served by the disqualification of that applicant. Mr. Choate is not guilty of offering any material inducement to influence the outcome of the proceeding or of actually arguing the merits of the case *ex parte*, but rather of attempting to establish a personal relationship with a member of the Commission with the hope of creating a favorable bias in that gentleman's mind which might be calculated to operate in favor of WHDH in the event of a close decision and of attempting to present to a member of the Commission *ex parte* a legal brief on a matter so intimately concerned with the then pending hearing that he must have been aware of the applicability of the general problem discussed therein to the specific issue at stake in the Boston hearing. Such conduct, while reflecting adversely on WHDH and weakening its comparative position vis-a-vis its competitors in the proceeding, does not demonstrate such a complete lack of character as to require absolute disqualification.

9. Our conclusions as to Massachusetts Bay are not unlike those with respect to WHDH, for we deem Clark's activities to be essentially similar to Choate's. We cannot lend full credence to his statement that he only sought to offset rumored "political activity" by other applicants, for, if he believed such rumors and believed that the Commission could actually be influenced by such activity, he

could not seriously have believed that his mild protest at a social luncheon would have altered the course of events. We deem his mission to have been similar to Choate's, that is, to demonstrate the responsible nature of the individuals owning the applicant he represented. In his own case such demonstration was tacit by exposing McConnaughey to his personality, but he went even further by intruding into the conversation the names of stockholders who had achieved distinction and national prominence in their own fields. Such conduct does not dictate absolute disqualification, but if does reflect adversely on the applicant and, in a comparative evaluation, weakens that applicant relative to its opponents.

10. We have not discussed the activities of Globe because we do not deem them relevant to our decision. Globe was not an applicant nor did its representatives act in connivance with any applicant. That the Taylors succeeded in interviewing individual Commissioners and expressing their views cannot be held to require the vacating of the entire proceeding, for such a ruling would imply that any entity not party to a proceeding could influence such proceeding to its own ends by the simple device of communicating its views to individual Commissioners, who could never know in advance the purpose of a visit, and thereby force them to disqualify themselves. Similarly, we see no relevance in Mr. McConnaughey's query to Mr. Hanson as to the status of the Globe complaint in the Department of Justice. He neither sought nor obtained facts or an opinion as to the pleadings before the Commission, and we do not deem the securing of a mere status report from another agency to be relevant to an inquiry into improper *ex parte* contacts.

11. The grant to WHDH being voided, we must make a new comparative evaluation of the applicants in order to determine the ultimate comparative effect of the adverse conclusions made on this record with respect to WHDH and Massachusetts Bay. Neither is disqualified, although each stands in a less advantageous position vis-a-vis its opponents, and it remains to be determined on the basis of a

comparison of both the conventional criteria contained in the original record of this proceeding and the facts disclosed on the remanded record which applicant would best serve the public interest. We believe that our final decision should be postponed until we have the benefit of the parties views through the media of briefs[11] and oral argument.

12. Finally, in that the previous grantee, WHDH, has not been found absolutely disqualified, we do not believe that the public interest would be served by depriving the people of Boston of the existing service during the pendency of the further proceedings ordered herein. Therefore, we shall permit WHDH to continue its operation on Channel 5, but on special temporary authority.

ACCORDINGLY, IT IS ORDERED, That the Commission's decision of April 24, 1957, granting a construction permit on Channel 5, Boston, Massachusetts to WHDH, Inc. Is VACATED and its grant Is SET ASIDE;

IT IS FURTHER ORDERED, That the parties to the proceeding shall be permitted on or before sixty days from the release of this decision to file briefs directed to a comparative reevaluation of the applicants on the basis of the record in the original proceeding as supplemented by the Commission's conclusions in the remanded proceeding, and that oral argument before the Commission *en banc* on the record and on such briefs shall be provided by further order of the Commission;

IT IS FURTHER ORDERED, Pending the final order of the Commission, that WHDH, Inc. Is GRANTED special temporary authority to continue operation on Channel 5, Boston, Massachusetts.

FEDERAL COMMUNICATIONS COMMISSION
Ben F. Waple
Acting Secretary

Adopted: July 14, 1960
Released: July 14, 1960

[11] The briefs, in order to be considered, will be confined to the parties' views as to the applicants ranking on each of the relevant criteria, the weight which each of the criteria should be accorded including the significance of the conclusions in this decision and, the ultimate conclusion as to the grant.

APPENDIX A

Massachusetts Bay Telecasters, Inc.

Exceptions	
1.	Denied not supported by record as a whole.
2.	Granted as reflected in decision, otherwise denied as immaterial.
3.	Granted.
4.	Denied for reason in decision.
5.	Granted.
6.	Granted.
7.	Denied, not supported by record as a whole.
8.	Denied, for reasons in decision.
9.	Granted as reflected in decision, otherwise denied as not supported by record as a whole.
10.	Denied, immaterial.
11, 12.	Denied, immaterial in view of Commission's decision.
13, 14, 15.	Denied, for reasons in decision.
16, 17, 18.	Denied, not supported by record as a whole.
19.	Denied, immaterial in view of Commission's decision.
20.	Denied, not supported by record as a whole.
21.	Denied, not supported by record as a whole, the gravity of the charges had not been reflected by the quality of the evidence.
22, 23.	Denied, not supported by the record as a whole.
24.	Denied, for reasons in decision.
25.	Granted.
26, 27, 28, 29.	Denied, not supported by record.

Massachusetts Bay Telecasters, Inc. (Cont'd)

Exceptions	
30.	Granted.
31.	Denied, for reasons in decision.
32.	Granted.
33.	Denied, immaterial in view of Commission's decision.
34.	Denied, immaterial, the gentlemen are sufficiently renowned that Mr. McConnaughey may be assumed to have been aware of their identity.
35.	Denied, for reasons in decision.
36.	Denied, immaterial.
37, 38.	Denied, for reasons in decision.
39.	Denied, immaterial.
40, 41.	Denied, for reasons in decision.
42.	Granted.
43.	Denied, immaterial.
44, 45, 46.	Denied, for reasons in decision.
47.	Denied, immaterial for reasons in decision
48, 49.	Denied, for reasons in decision.
50.	Denied, immaterial.
51.	Granted.
52.	Denied, not supported by record as a whole.
53.	Denied, immaterial.
54.	Granted.
55, 56, 57, 58, 59.	Denied, not supported by record as a whole.
60.	Denied, immaterial in view of Commission's decision.
61.	Denied, for reasons in decision.
62.	Denied, not supported by record as a whole.

Massachusetts Bay Telecasters, Inc. (Cont'd)

Exceptions	
63, 64.	Denied, for reasons in decision.
65.	Denied, immaterial.
66.	Denied, not supported by record.
67, 68.	Denied, for reasons in decision.
69, 70.	Granted.
71, 72, 73.	Denied, for reasons in decision.
74.	Granted, as reflected in decision, otherwise denied as not supported by the record.
75.	Granted, as reflected in the decision, otherwise denied as immaterial and not supported by the record.
76.	Granted, as reflected in the decision, otherwise denied as not supported by the record.
77.	Granted.
78.	Denied, for reasons in decision.
79.	Denied, not supported by record as a whole.
80, 81, 82.	Granted.
83.	Denied, immaterial.
84.	Granted.
85.	Denied, not supported by record.
86.	Denied, not supported by record as a whole.
87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107.	Denied, for reasons in decision.
108.	Denied, immaterial.
109.	Denied, not supported by record as a whole.
110.	Denied, for reasons in decision.
111.	Denied, irrelevant.

Massachusetts Bay Telecasters, Inc. (Cont'd)

Exceptions	
112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124.	Denied, for reasons in decision.
125.	Denied, irrelevant.
126, 127.	Granted.
128, 129.	Denied, for reasons in decision.
130.	Denied, exception rests on an invalid premise.
131.	Denied, for reasons in decision.
132, 133.	Denied, for reasons in decision.

Greater Boston Television Corporation

Exceptions	
1, 2, 3, 4, 5.	Not accepted for failure to comply With the Sec. 1.154(a) of the Commission's Rules.
6.	Denied, immaterial.
7.	Not accepted for failure to comply With the Sec. 1.154(a) of the Commission's Rules.
8, 9.	Denied, for reasons in decision.
10.	Granted.
11.	Denied, immaterial.
12.	Denied, argumentative material which should properly be presented in the brief.
13.	Denied, irrelevant.
14.	Granted.

Department of Justice

1, 2.	Granted to the extent reflected in the decision.
3.	Granted.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

* * * * * * * * *

Further Report of Progress

1. The Federal Communications Commission files herewith its Further Report of Progress.

2. Since the Commission's recent prior Report herein, dated June 21, 1960, to which reference is now made, the Commission has issued its Decision in the proceedings involving the construction permit for a television station on Channel 5 at Boston, Massachusetts. The Commission's Decision, adopted and released July 14, 1960, a copy of which is attached hereto, (1) concludes that its Decision of April 24, 1957, granting a construction permit for Channel 5, Boston, to WHDH, Inc., must be vacated and the grant set aside; (2) permits the parties to file briefs within 60 days directed to a comparative reevaluation of the applicants on the basis of the record of the original proceeding, as supplemented by the Commission's conclusions in the remanded proceeding that the conduct of WHDH, Inc., and Massachusetts Bay Telecasters, Inc., reflects adversely upon their respective comparative qualifications; (3) orders subsequent oral argument before the Commission *en banc* on the record and on the briefs; and (4) permits WHDH, since it has not been disqualified, to continue its present Channel 5 operation under special temporary authority, pending the final order of the Commission.

3. In the Court's Opinion of July 31, 1958 in the instant proceeding, jurisdiction over the above-captioned appeals was retained by the Court "pending receipt of the findings

and final report of the Commission." The Commission does not view the attached Decision as the "final report" of the Commission, required by the Court's Order, in light of the further proceedings yet to be held. Upon completion of such proceedings ordered by the Commission, and issuance of its final Order in the Docket case, the Commission will submit its "final report," pursuant to the requirements of the Court's Order.

Respectfully submitted,

John L. FitzGerald
General Counsel

Max D. Paglin
Assistant General Counsel
Federal Communications
Commission

July 21, 1960

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

Memorandum Opinion and Order

By the Commission:

1. The Commission's July 14, 1960 Decision (29 FCC 204) ordered, among other things, that the parties shall be permitted on or before sixty days from the release of the Decision to file briefs directed to a comparative reevalua-

tion of the applicants. On August 16, 1960, WHDH filed a Motion for Stay pending consideration and disposition of a simultaneously filed Petition for Reconsideration. Other pleadings relative to this matter may be filed. The sixty-day period specified in the July 14 Decision ends September 12, 1960.

2. It is desirable that WHDH's request for stay and related pleadings be considered by the full Commission. There will not be sufficient time for this consideration between conclusion of the August recess and the date upon which briefs are due. Therefore, a postponement of the latter date until September 27, 1960, would be appropriate.

ACCORDINGLY, IT IS ORDERED, This 22nd day of August, 1960, that the time for filing the briefs provided for in the July 14, 1960, Decision, Is POSTPONED to September 27, 1960.

FEDERAL COMMUNICATIONS COMMISSION
Ben F. Waple
Acting Secretary

Released: August 23, 1960

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

* * * * * * * * *

Memorandum Opinion and Order

By the Commission: Commissioner Lee dissenting and issuing a statement; Commissioners Craven and King not participating.

1. The Commission has for consideration a motion filed by WHDH, Inc. on August 15, 1960, seeking a stay of the effectiveness of our decision adopted July 14, 1960 pending the disposition of a petition for rehearing filed by WHDH on August 15, 1960, together with pleadings filed in response thereto.

2. Our decision of July 14, 1960 vacated our April 24, 1957 grant of construction permit to WHDH; ordered a comparative reevaluation of the applicants; allowed the parties sixty days in which to file briefs directed to such reevaluation;[1] and permitted WHDH to continue operation of the facility on special temporary authority pending final disposition of this proceeding.

3. The criteria for judging whether a stay should be issued are that (1) failure to grant a stay will result in irreparable injury to the public or petitioner's interest; and (2) that petitioner is likely to succeed on the merits of its petition for reconsideration, *Gillespie Broadcasting Company*, 15 RR 881 (1958); *The Toledo Blade Company*, 15 RR 835 (1958); *Triad Television Corporation*, 16 RR 698 (1958); and *WGLI, Inc.*, 14 RR 964(b) (1958). Clearly, WHDH has failed to establish the first prerequisite, for there is no showing of irreparable injury to either its interest or the public interest if the decision of July 14, 1960 is permitted to remain in effect pending resolution of the petition for rehearing. While the character of WHDH's operating authority has been changed from program test authority to special temporary authority, there need be no interruption of its operation, pending ultimate disposition of this proceeding. Even if we should, upon due consideration, concur with the arguments advanced by WHDH in its petition for rehearing, failure to stay the effect of the decision of July 14, 1960 will have had no adverse effect other than to have required the parties to submit briefs which will have been rendered unnecessary. Such inconvenience falls far short of the irreparable injury which must be shown to invoke a stay. Moreover, the pleadings, while raising questions necessitating careful consideration, fail to demonstrate the required likelihood that WHDH will prevail on the merits.

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[1] By Order of August 22, 1960 the date for filing of briefs was postponed to September 27, 1960.

ACCORDINGLY, IT IS ORDERED, This 14th day of September, 1960, That the motion for stay filed by WHDH, Inc., on August 15, 1960, Is DENIED.

FEDERAL COMMUNICATIONS COMMISSION*
Ben F. Waple
Acting Secretary

Released: September 16, 1960

DISSENTING OPINION OF COMMISSIONER ROBERT E. LEE

Although the legal prerequisites for the issuance of a stay do not appear to be present here, I would grant a stay pending disposition of the petition for reconsideration.

The petition for reconsideration raises several substantial legal questions, not the least of which is the jurisdictional question of whether under the terms of the Court's mandate the Commission may alter the terms of WHDH's operating authority prior to making a "final report" to the Court.[1]

There is also a practical consideration involved. In its decision on the remand (FCC 60-853), the Commission ordered the parties "to file briefs directed to a comparative reevaluation of the applicants on the basis of the record in the original proceeding as supplemented by the Commission's conclusions in the remanded proceeding . . ." The parties cannot file meaningful briefs when the basis for the Commission's decision on remand may very well be altered substantially as a result of the Commission's consideration of the pending petition for reconsideration.

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* See attached dissenting statement of Commissioner Lee.

[1] See *Massachusetts Bay Telecasters* v. *Federal Communications Commission*, 261 F. 2d 55, 67 (1958), where the Court stated that "/o/ur order will provide that the *status quo* is to be maintained, and that we retain jurisdiction of these appeals pending receipt of the findings and final report of the Commission." Presumably, the Court had reference to a decision which would take into consideration any impact on our original comparative evaluation. Otherwise the case would not be ripe for review.

It should also be noted that none of the parties can be injured by maintenance of the *status quo* pending consideration of the petition for reconsideration.

In view of the foregoing, I must dissent to the adoption of the instant opinion.

United States Court of Appeals for the District of Columbia Circuit
Filed Oct. 7, 1960

Order

This court by its order entered July 31, 1958, having instructed the Commission to proceed forthwith to hold an evidentiary hearing as to certain particularly specified issues as follows:

(1) Whether or not any *member* of the Commission should have disqualified himself in the present case;

(2) Whether any *person* or *persons* influenced or attempted to influence any member of the Commission in any manner whatsoever except by the recognized and public processes of adjudication (see *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, 534-35, 540-41 (3rd Cir. 1948)), and if so, the full facts and circumstances;

(3) Whether any *party* to the proceeding before the Commission directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct which may be found by the Commission to have occurred;

(4) Whether or not in the light of such findings, the grant of a permit for Channel 5, Boston, was void *ab initio* and if not, is voidable and action should be taken to set it aside, and whether any one applicant or more than one may have been disqualified to receive a grant of its application; and

(5) Whether the conduct of any party-applicant if not of a disqualifying character, has been such as to reflect adversely upon such party-applicant from a comparative standpoint.

And the Commission having been ordered to make findings of fact and to submit to this court its recommendations with respect thereto; and the court having further directed that the status quo be maintained pending further order of this court, to which end jurisdiction of the appeals was retained "pending receipt of the findings and final report of the Commission pursuant to" the order of July 31, 1958; and the Commission having been directed to report to the court its progress with respect to the inquiries upon remand; and certain "progress" reports submitted by the Commission from time to time between July 31, 1958, and June 21, 1960, having been approved by the court as filed; and the Commission having filed on June 21, 1960, a "further report of progress" summarizing the Initial Decision released September 23, 1959, by Judge Stern sitting as Special Commission Hearing Examiner and advising that exceptions had been filed thereto, with respect to which oral argument had been held before the Commission *en banc* on April 22, 1960, and stating that the matter was then awaiting decision by the Commission; and, without having submitted to this court its findings and recommendations with reference to the issues above stated, the Commission on July 21, 1960, having filed its further report reciting that the Commission on July 14, 1960, had already set aside its original award of a construction permit for a television station on Channel 5 at Boston, Massachusetts; and it appearing to the court that the Commission had thus altered the status of the parties notwithstanding this court's order of July 31, 1958, which had expressly directed that the status quo be maintained pending the further order of this court; and various parties having subsequently submitted certain pleadings to this court seeking to raise

issues with respect to the Commission's order of July 14, 1960;

Now, Therefore, after consideration of the foregoing and the record in said cause it is Ordered by the court:

(1) That the Commission's order of July 14, 1960, be and the same is stayed and no effect shall be given thereto pending the further order of this court;

(2) The Commission is hereby granted thirty days within which to submit to this court as to the several issues hereinbefore set forth its findings and recommendations based upon the supplemental record compiled before the Special Commission Hearing Examiner;

(3) That the foregoing action by this court is deemed required in the interest of orderly procedure and to give effect to our order of July 31, 1958, directing the preservation of the status quo pending our further action; and

It is Further Ordered by the court that the foregoing order shall be deemed to be without prejudice to such further action as to the court shall seem desirable.

After the findings and recommendations of the Commission shall have been considered the court may wish to specify issues for briefing and oral argument or to make such other disposition as may be deemed appropriate.

Per Curiam.

Dated: October 7, 1960

Order

Filed Oct. 14, 1960

Upon consideration of the motion of appellant in case No. 13,899 for leave to file late its opposition to the petition for expeditious certification of the supplementary record

to permit early disposition of these appeals, and it appearing that the opposition has been lodged with the Clerk, it is

ORDERED by the court that the Clerk is directed to file the opposition of appellant in case No. 13,899 to the petition for expeditious certification of the supplemental record

Dated: October 14, 1960 Per Curiam.

Order

Filed Oct. 14, 1960

Upon consideration of the motion of the United States for leave to intervene as amicus curiae in these cases, to file briefs and to argue orally, and it appearing that no objections have been filed, it is

ORDERED by the court that the United States is allowed to participate in these cases as an amicus curiae, to file briefs and to participate in oral argument.

Dated: October 14, 1960 Per Curiam.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

Memorandum Opinion and Order

By the Commission: Commissioner Lee dissenting and issuing separate views; Commissioners Craven and King not participating.

1. The Commission has for consideration a petition for rehearing of its decision of July 14, 1960, filed by WHDH, Inc. on August. 15, 1960, together with pleadings filed in response thereto.

2. We shall not address ourselves to that portion of the petition directed to our jurisdiction to vacate the WHDH

grant, for that question has been rendered moot by the action of the United States Court of Appeals for the District of Columbia taken on October 7, 1960 in *Mass. Bay Telecasters* v. *FCC*, appeal #13,896, et al.

3. The WHDH contention that the record does not support the Commission's conclusions adverse to it is based on no facts not previously considered by the Commission. WHDH relies essentially on the argument that the facts of record do no more than create a mere suspicion of wrongdoing; that the Commission must have more than mere suspicion; and that it must base its findings upon "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474. We do not agree that the record here creates no more than a mere suspicion of wrongdoing. Our evaluation of the direct and circumstantial evidence is set forth in our decision of July 14, 1960. Nothing presented in the WHDH petition persuades us that our findings therein relative to WHDH were in error.

4. We find no merit in the contention that the record requires additional findings adverse to the other applicants. With respect to the DuMont application, we found that Mr. McConnaughey had lunched with Dr. DuMont, but that there was no indication that the Channel 5 case was discussed. There being no evidence that it was Dr. DuMont who had sought these luncheons, we did not, nor do we now, deem it necessary to indicate in our conclusions that we see no impropriety in the mere fact of luncheon discussions between a new Chairman of this agency and one of the nation's foremost authorities on electronic communications, when no surrounding circumstances indicate such luncheons to have been other than innocent attempts by Mr. McConnaughey to obtain the benefit of Dr. DuMont's views on industry-wide problems. There is a similar lack of merit in the attempt to link Greater Boston and Massachusetts Bay to the visit of the Messrs. Taylor to Wash-

ington. While the record indicates that before the Taylors' trip they informed Mr. Leahy of Greater Boston and possibly Mr. Steinert of Massachusetts Bay that they intended to come to Washington and check rumors that the Commission was going to award the grant to WHDH, the record does not indicate that they advised Mr. Leahy or Mr. Steinert of the persons they intended to see, or even that they themselves knew prior to their departure on whom they would call. Although the Taylors testified that after they returned from Washington they may have advised principals of Greater Boston and Massachusetts Bay of the details of the trip, we do not regard the acquisition of such *ex post facto* information as reflecting adversely on the character of the parties.[1]

Accordingly, It Is Ordered, This 1st day of November, 1960, that the petition for rehearing filed by WHDH, Inc. on August 15, 1960, Is Denied.

Federal Communications Commission*
Ben F. Waple
Acting Secretary

Released: November 2, 1960

Separate Views of Commissioner Robert E. Lee

In view of the Court's order dated October 7, 1960, in *Massachusetts Bay Telecasters, Inc.* v. *Federal Communications Commission* (U. S. App. D. C. Case No. 13,896 *et al*), I would not pass on the merits of the petition for

[1] We are not impressed by nor do we condone that portion of the WHDH reply to oppositions which intimates that the Commission's General Counsel suppressed evidence which would have cast discredit on DuMont, Greater Boston and Massachusetts Bay. The pleading relies entirely on innuendo and is devoid of specific allegations as to what facts were suppressed. We do not believe that the tactic of insinuation, without quite accusing opposing counsel of such unethical and improper conduct, is calculated to inspire confidence in the balance of petitioner's pleading.

* See Separate Views of Commissioner Robert E. Lee attached.

reconsideration filed by WHDH pending further clarification by the Court. This I consider necessary since the Commission's opinion is not completely dispositive of all pending matters[1] and since the Court has ordered us to maintain the *status quo*.

Although it may be argued that we should rule on any pending petitions for reconsiderations of the so-called *ex parte* case in order that the Court will be presented with a final decision on the matters in issue,[2] I am reluctant to do so in the face of the uncertainties created by the Court order mentioned above.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

* * * * * * * * * *

Report and Recommendation

By the Commission: Commissioner Graven absent

1. On April 25, 1957, the Commission released a Decision (22 FCC 761) resolving a comparative hearing for a new television station on Channel 5, Boston, Massachusetts in favor of WHDH, Inc., and denying the competing applications of Greater Boston Television Corp., Massachusetts Bay Telecasters, Inc., and Allen B. DuMont Laboratories, Inc. Appeals to the United States Court of Appeals for the District of Columbia Circuit were filed by Greater Boston and Massachusetts Bay, and on July 31, 1958, that Court issued its decision affirming the Commission on the basis of the record on which the Commission had decided the case but remanding for inquiry into factors not contained in the original record.

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[1] *E.g.*, there is a petition pending to dismiss DuMont's application.

[2] Presumably such action could be taken without altering the status of our original decision in this case and WHDH's operating authority.

2. The Court noted that, subsequent to the Commission's disposition of the proceeding, testimony by a member of the Commission before the House Subcommittee on Legislative Oversight indicated that various individuals connected with some of the parties to the proceeding had conferred with him with reference to the case while the matter was still under consideration by the Commission. In light of this testimony, the Court remanded the case to the Commission with direction to hold an evidentiary hearing and make findings of fact on the following issues:

(1) Whether or not any *member* of the Commission should have disqualified himself in the present case;

(2) Whether any *person* or *persons* influenced or attempted to influence any member of the Commission in any manner whatsoever except by the recognized and public processes of adjudication (see *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, 534-35, 540-41 (3rd Cir. 1958), and if so, the full facts and circumstances;

(3) Whether any *party* to the proceeding before the Commission directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct which may be found by the Commission to have occurred;

(4) Whether or not in the light of such findings, the grant of a permit for Channel 5, Boston, was void *ab initio* and if not, is voidable and action should be taken to set it aside, and whether any one applicant or more than one may have been disqualified to receive a grant of its application; and

(5) Whether the conduct of any party-applicant, if not of a disqualifying character, has been such as to reflect adversely upon such party-applicant from a comparative standpoint.

The Court indicated that the Commission's findings and conclusions on the specified issues should form the basis of a "report" which would "supplement the record upon which [the] appeal had so far been based."

3. Pursuant to the remand, the Commission designated the matter for hearing before a Special Hearing Examiner, Judge Horace Stern, on issues modeled on those specified by the Court. On September 23, 1959, the Hearing Examiner released an Initial Decision which proposed to affirm the Commission's grant to WHDH, Inc. Following exceptions and oral argument, the Commission on July 14, 1960, released a Decision and Order containing its findings and conclusions on the issues specified by the Court in its Order of July 31, 1958,[1] A Petition for Reconsideration of that Decision, filed by WHDH on August 15, 1960, was denied in a Memorandum Opinion and Order of November 1, 1960, released on November 2, 1960. The Commission's Decision of July 14, 1960, and Memorandum Opinion and Order of November 1, 1960, copies of which are transmitted herewith, contain detailed findings of fact, conclusions, and rulings on exceptions, which embody our findings and conclusions on the above-specified issues.

4. On the basis of these decisions and in response to the above-specified issues, we report our findings and conclusions to the Court as follows:

Issue 1

No member of the Commission, who participated in the instant case, should have disqualified himself.

Issue 2

There were attempts to influence members of the Commission, but no actual influence occurred. Robert B. Choate, a principal of WHDH, Inc., and Forrester A. Clarke, a

[1] The effectiveness of the Commission's Order of July 14, 1960, was stayed by the Court on October 7, 1960.

principal of Massachusetts Bay Telecasters, attempted to influence the Commission's original Decision of April 25, 1957, by means other than the recognized and public processes of adjudication. Moreover, William Davis Taylor and John S. Taylor, respectively the president and vice-president of Globe Newspaper Company (which was not an applicant in this proceeding), made calls on each of the Commissioners in an attempt to prevent an award to WHDH. No member of the Commission was in fact influenced by any of the foregoing activities. The full facts and circumstances surrounding such activities are set forth in our Decision of July 14, 1960 and Memorandum Opinion of November 1, 1960.

Issue 3

Robert B. Choate is a principal of WHDH, Inc. and Forrester A. Clark is a principal of Massachusetts Bay Telecasters. Their conduct is accordingly attributable to such parties. Globe Newspaper Company was not an applicant in this proceeding and its representatives did not act in connivance with any applicant.

Issue 4

In the light of the findings on the above issues and all the circumstances, we have concluded that the grant to WHDH was not void *ab initio* and that none of the applicants is disqualified to receive a grant of its application. We have, however, concluded that the grant to WHDH is voidable and that action should be taken to set it aside

Issue 5

The conduct of WHDH and of Massachusetts Bay Telecasters, while not disqualifying, has been such as to reflect adversely upon such applicants from a comparative standpoint.

5. Accordingly, we recommend that, in accordance with the views expressed in our Decision and Memorandum Opinion, the Court remand the entire matter to the Commission in order that we may set aside the grant to WHDH, reevaluate the comparative positions of the applicants on the basis of the record as supplemented, and make a new determination in the light thereof. We further direct the General Counsel of the Commission to transmit to the Court this Report and Recommendation, the underlying decisions and the record, together with appropriate recommendations as to the manner and timing of judicial review and the disposition of the pending appeals.

FEDERAL COMMUNICATIONS COMMISSION
Ben F. Waple
Acting Secretary

Adopted: November 4, 1960
Released: November 7, 1960

United States Court of Appeals for the
District of Columbia Circuit
Filed Jan. 19, 1961

* * * * * * * * *

Order

WHEREAS this court in its opinion of July 31, 1958, indicated its intention on the record then before the court, to affirm the Commission's order of April 25, 1957, awarding VHF Channel 5 in Boston to WHDH, Inc., as to which no judgment by this court was then entered;

AND WHEREAS the court by its order of July 31, 1958, directed that the status quo be maintained pending the court's further order to follow consideration of the Commission's findings and final report as to whether the said award be void *ab initio* or voidable and as to the possible disqualification of a party or various parties, in which respect the court directed that a further evidentiary hearing

be held especially directed to certain specified particulars; and the proceedings having been remanded for such purposes;

AND WHEREAS the court by its further order of October 7, 1960, noted that, in derogation of this court's order of July 31, 1958, "that the status quo in these cases be maintained," the Commission had purported to act on July 14, 1960, without having submitted its findings and recommendations to the court, and thereupon ordered that the Commission submit to the court findings and recommendations based upon the supplemental record compiled before the Special Hearing Examiner, Hon. Horace Stern;

AND WHEREAS the Commission on November 7, 1960, filed in this court its "Report and Recommendation" adopted November 4, 1960, in which were recited inter alia the specific particulars concerning the issues above referred to and as to which the court required the Commission's findings and recommendations, which may, for present purposes, be summarized as follows:

As to issue 1: no member of the Commission who participated in the instant case should have disqualified himself;

As to issue 2: there were attempts to influence members of the Commission, but no actual influence occurred;

As to issue 3: certain conduct of one Choate, a principal of WHDH, Inc., and of one Clark, a principal of Massachusetts Bay Telecasters, has been found to be attributable to such parties;

As to issue 4: the original grant to WHDH was not void *ab initio* and that no applicant has been disqualified to receive a grant of its application, but that the grant to WHDH is voidable and that action should be taken to set it aside; and

As to issue 5: the non-disqualifying conduct of WHDH and of Massachusetts Bay Telecasters has

nevertheless been such as to reflect adversely upon such applicants from a comparative standpoint; and

NOW, THEREFORE, the court having considered the foregoing findings as summarized, and the Commission's recommendation based thereon, it now approves the findings and recommendation.

And it is accordingly ordered that the Commission's said order of April 25, 1957, is vacated, and that the proceedings be remanded to the Commission in order that it may reevaluate the comparative positions of the applicants on the basis of the record as supplemented and make a new determination in the light thereof, and take such further action, if any, as the Commission shall deem appropriate.

Per Curiam.

Dated: January 19, 1961

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals for the District of Columbia Circuit
Filed—Feb. 16, 1961. Joseph W. Stewart, Clerk

* * * * * * * * *

Order

Upon consideration of intervenor's petition for rehearing and other relief, it is

ORDERED by the court that the petition for rehearing and other relief is denied.

Per Curiam.

Dated: February 16, 1961

Order

Filed March 9, 1961

Upon consideration of intervenor's motion for stay of mandate, of the opposition of appellant in case No. 13,896, of appellee's opposition and of intervenor's reply to appellee's opposition, it is

ORDERED by the court that the issuance of the certified copy of the order of this court entered in the above-entitled cases on January 19, 1961, is stayed to and including March 21, 1961.

Dated: March 9, 1961 Per Curiam.

Proof of Service

I, Harry J. Ockershausen, one of the attorneys for WHDH, Inc., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on March 21, 1961 I served a copy of the Appendix to Petition for Writ of Certiorari on the Solicitor General of the United States; Federal Communications Commission, Respondent herein; Massachusetts Bay Telecasters, Inc., Respondent herein; and Greater Boston Television Corporation, Respondent herein, by mailing copies, in duly addressed envelopes, with first class postage (or air mail postage, as indicated) prepaid, as follows:

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FILE COPY

In the

Supreme Court of the United States

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT MASSACHUSETTS BAY TELECASTERS, INC. IN OPPOSITION

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In the
Supreme Court of the United States

OCTOBER TERM, 1960

No. 838

WIDH, Inc., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, MASSACHUSETTS BAY TELECASTERS, INC., AND GREATER BOSTON TELEVISION CORPORATION, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT MASSACHUSETTS BAY TELECASTERS, INC. IN OPPOSITION

Questions Presented

1. Did the Court of Appeals have power to retain jurisdiction in connection with the remand of this case—a comparative proceeding for a television channel—to the Commission for an evidentiary hearing concerning newly discovered evidence of improper ex parte contacts by the prevailing applicant, among others, with the Chairman of the Commission during the pendency of the proceeding before the Commission?

2. Did the Court of Appeals exceed its supervisory powers by specifying that a) certain parties in the proceedings before the Commission be permitted "to participate as parties in the evidentiary hearing," b) "any person or persons concerning whom evidence may be received" shall "be permitted to cross-examine and to submit rebuttal testimony," c) the Attorney General be permitted to "participate in the hearing as amicus curiae", and d) the Commission report its progress to the Court?

3. The commission in the above-described remanded proceeding having (a) found that the prevailing applicant had improperly attempted to influence the outcome of the proceeding and conducted itself in a manner that reflected adversely from a comparative standpoint, and b) recommended that the grant should be set aside and that a new determination should be made on the basis of a comparative re-evaluation of the applicants, was the Court of Appeals required to review the Commission's findings and recommendation before authorizing it to proceed with the comparative re-evaluation?

Statement

Initial Proceedings before the Commission

This case arises out of protracted comparative proceedings for VFH Channel 5 in Boston which commenced on June 21, 1954, with the designation of six applications for hearing.

Almost three years later, on April 25, 1957, the Federal Communications Commission (hereinafter referred to as the "FCC" or the "Commission") released a decision awarding Channel 5 to WHDH, Inc. ("WHDH") and denying mutually exclusive applications, including those of

Greater Boston Television Corporation ("GBT") and Massachusetts Bay Telecasters, Inc. ("MBT"), respondent herein. *WHDH, Inc. et al.*, 22 FCC 767 (1957).

Appeal to the Court of Appeals

Appeals were taken by GBT and MBT.

On July 31, 1958, the Court of Appeals remanded the case for an evidentiary hearing concerning newly discovered evidence of improper ex parte contacts by the prevailing applicant, among others, with the Chairman of the Commission. The Commission had, in another case, lodged with the clerk of the Court a transcript of Congressional hearings. In the course of its study of that transcript the Court observed, on the basis of the Chairman's sworn testimony,

> "that various individuals connected with some of the parties to the instant appeals had conferred with him with reference to the pending case while the matter was under consideration by the Commission and before the issuance of its final decision on April 25, 1957. Among such individuals were one Forrester Clark, of MBT, one Robert Choate of WHDH, and certain representatives of the Boston Globe." (A. 20a-21a).*

Accordingly, although the Court would have affirmed on the basis of the record before it, it ordered that

> "these cases be, and they are hereby, remanded to the Federal Communications Commission with instructions to proceed forthwith to hold an evidentiary hearing concerning the possibility that the award heretofore

* References to "A" are to the Appendix to the Petition.

made be void *ab initio* or voidable and that a party, or various parties, might be disqualified by reason of misconduct to receive an award of a television construction permit . . . " (A. 25a).

The Court ordered the Commission to make findings of fact which shall include "but not be limited to, findings of fact in the following particulars:

(1) Whether or not any *member* of the Commission should have disqualified himself in the present case;

(2) Whether any person or persons influenced or attempted to influence any member of the Commission in any manner whatsoever except by the recognized and public processes of adjudication (see *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F.2d 514, 534-35, 540-41 (3rd Cir. 1948)), and if so, the full facts and circumstances;

(3) Whether any party to the proceeding before the Commission directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct which may be found by the Commission to have occurred;

(4) Whether or not in the light of such findings, the grant of a permit for Channel 5, Boston was void *ab initio* and if not, is voidable and action should be taken to set it aside, and whether any one applicant or more than one may have been disqualified to receive a grant of its application; and

(5) Whether the conduct of any party-applicant if not of a disqualifying character, has been such as to reflect adversely upon such party-applicant from a comparative standpoint." (A. 25a-26a).

The Court further ordered that

> "The status quo in these cases shall be maintained pending further order of this court, and this court hereby retains jurisdiction of these appeals pending receipt of the findings and final report of the Commission pursuant to this order. . . . " (A. 26a).

WHDH, although it now challenges the Court of Appeals' order of July 31, 1958, did not file a Petition For Rehearing or a Petition for a Writ of Certiorari. (A. 27a-28a).

Remanded Proceeding

In the proceedings on remand, hearings were held from February 16 to February 20, on February 24 and 25, and on March 9, 1959, and much evidence was introduced bearing on influence and disqualification. (A. 43a-55a).

The United States and the General Counsel of the Commission both urged that WHDH had improperly attempted to influence the outcome of the proceeding and was absolutely disqualified by reason of such misconduct to operate a television station, and that, accordingly, its grant should be set aside and it should be denied further comparative consideration. Brief of the United States as Amicus Curiae, pp. 8-13; Proposed Findings of Fact and Conclusions of Law of the Office of the General Counsel, p. 44; Brief of the Office of the General Counsel in Support of Proposed Findings of Fact and Conclusions of Law, pp. 90-95.

The Commission, in its decision adopted and released on July 14, 1960, found that Mr. Robert Choate, president and director of WHDH, vice-president and director of Boston Herald-Traveler Corp. (owner of all of WHDH's stock),

and editor and publisher of the Boston Herald and Traveler newspapers, had conducted himself improperly in his zeal to get Channel 5 for WHDH. (A. 90a et seq.). Specifically, the Commission found that Mr. Choate sought, at two personal meetings with Chairman McConnaughey initiated by Mr. Choate and arranged and attended by a mutual friend (Mr. Charles Mills, a member of the Renegotiation Board), "to demonstrate by his demeanor and presence that he was a responsible man representing responsible interests who merited favorable consideration of their application to conduct an operation in the public interest", and at the second such meeting to present to Chairman McConnaughey a memorandum on the critical issue in the comparative case—diversification of the media of mass communication—in the guise of a purported memorandum on legislation. (A. 93a-95a, 99a-101a).*

Having so found, the Commission concluded as follows:

> "7. The very attempt to establish such a pattern of influence does violence to the integrity of the Commission's processes. Such an attack on the integrity of the processes of any adjudicatory body brings into play its inherent right to protect such processes, and one of the remedial measures available, in its discretion, is the voiding of any previous action that may have been tainted by such attempt. The facts revealed on this record persuade us that the Commission's processes can best be protected in this instance by exercising our discretion to void the grant to WHDH."
>
> "8. It follows that we must now determine our ultimate disposition of the construction permit for Chan-

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* The Examiner had decided adversely to WHDH principally because of "the Commission's policy for diversification of control of mass communications media." Joint Appendix (part of the record filed with this Court), pp. 515-517.

nel 5 in Boston, and the role, if any, WHDH should play in such disposition. There is no question that the attempted pattern of influence disclosed on this record reflects adversely on WHDH, but we do not believe in light of all the circumstances that the public interest would be best served by the disqualification of that applicant. Mr. Choate is not guilty of offering any material inducement to influence the outcome of the proceeding or of actually arguing the merits of the case *ex parte*, but rather of attempting to establish a personal relationship with a member of the Commission with the hope of creating a favorable bias in that gentleman's mind which might be calculated to operate in favor of WHDH in the event of a close decision and of attempting to present to a member of the Commission *ex parte* a legal brief on a matter so intimately concerned with the then pending hearing that he must have been aware of the applicability of the general problem discussed therein to the specific issue at stake in the Boston hearing. Such conduct, while reflecting adversely on WHDH and weakening its comparative position vis-a-vis its competitors in the proceeding, does not demonstrate such a complete lack of character as to require absolute disqualification." (A. 101a-102a).

Accordingly, the Commission 1) vacated its decision of April 25, 1957, 2) set aside the grant to WHDH, 3) granted WHDH special temporary authority to continue operation on Channel 5 pending final decision, 4) requested briefs directed toward a re-evaluation of the applicants' comparative qualifications to operate Channel 5 "on the basis of the record in the original proceeding as supplemented by the Commission's conclusions in the remanded proceeding." (A. 104a).

Further Proceedings Before the Court of Appeals

After some maneuvering before the Commission (A. 111a, 117a), WHDH, on September 16, 1960, filed with the Court of Appeals a "Petition For Expeditious Certification of Supplementary Record to Permit Early Disposition of Appeals" charging that the Commission's action was in defiance of that portion of the Court of Appeals' Order of July 31, 1958 directing that the "status quo" be maintained. WHDH asked the Court of Appeals, among other things, to require the parties to file briefs addressed to whether the Commission's April 25, 1957 award to WHDH should "be affirmed or be vacated" and for oral argument "on such matter." Petition For Expeditious Certification, pp. 14-15.*

On October 7, 1960, the Court of Appeals held that "the Commission had . . . altered the status of the parties notwithstanding this Court's order of July 31, 1958, which had expressly directed that the status quo be maintained pending the further order of this Court" and ordered

> "(1) That the Commission's order of July 14, 1960, be and the same is stayed and no effect shall be given thereto pending the further order of this court;
>
> (2) The Commission is hereby granted thirty days within which to submit to this court as to the several issues hereinbefore set forth its findings and recommendations based upon the supplemental record . . . ;
>
> (3) That the foregoing action by this court is deemed required in the interest of orderly procedure and to give effect to our order of July 31, 1958, di-

* The Petition For Expeditious Certification is part of the record filed with this Court.

> recting the preservation of the status quo pending our further action . . . ." (A. 114a-116a).

The Court further ordered that "the foregoing order shall be deemed to be without prejudice to such further action as to the Court shall seem desirable" and stated that

> "After the findings and recommendations of the Commission shall have been considered the court may wish to specifiy issues for briefing and oral argument or to make such other disposition as may be deemed appropriate." (A. 116a).

On November 7, 1960, the Commission, in conformity with the Court of Appeals order of October 7, 1960, filed a "Report and Recommendation" embodying the findings set forth in its Decision of July 14, 1960 and recommending that its order of April 25, 1957 awarding Channel 5 to WHDH be vacated and the grant to WHDH set aside and that there be a comparative re-evaluation of the applicants on the basis of the record as supplemented. (A. 120a-124a).

On January 19, 1961, the Court of Appeals approved the Commission's findings and recommendations as a basis for further action by the Commission and, in accordance with the Commission's recommendation,

> "ordered that the Commission's said order of April 25, 1957, is vacated, and that the proceedings be remanded to the Commission in order that it may re-evaluate the comparative positions of the applicants on the basis of the record as supplemented and make a new determination in the light thereof, and take such further action, if any, as the Commission shall deem appropriate." (A. 124a-126a).

There was no interlocutory review of the Commission's action. The Court merely authorized the Commission to take further action that the Court could have authorized in the first place and that the Commission would have been authorized to take under the Court's order of July 31, 1958, but for the Court's direction that "the status quo . . . be maintained." (A. 26a).

WHDH's Petition For Rehearing was denied on February 16, 1961. (A. 126a).

Reasons for Denying the Writ

I.

THE JUDGMENT OF THE COURT OF APPEALS IS NOT A FINAL JUDGMENT AND THE MATTERS PRESENTED ARE NOT APPROPRIATE FOR INTERLOCUTORY REVIEW.

The judgment which Petitioner asks this Court to review has the effect simply of remanding the case to the Commission, in accordance with the Commission's own recommendation, for a comparative re-evaluation of the applicants on the basis of the original and the supplemented record and for final definitive action—the award of Channel 5 to one of the remaining three competing applicants. (A. 124a *et seq.*)

This Court has never looked with favor upon interlocutory petitions for writ of certiorari, and it has granted them only in exceptional circumstances.* No such circumstances obtain here. On the contrary, this case has not only

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* The governing principle is well stated in *American Construction Co. v. Jacksonville*, 148 U.S. 373, 384 (1893), as follows:

"Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and

the usual elements which militate strongly against interlocutory review but additional elements.

1. If, as is entirely possible, the Commission again decides to award the contested channel to WHDH, all the questions which the Petitioner is now asking this Court to consider will become moot. While the Commission has determined that WHDH's conduct reflects adversely upon it from a comparative standpoint, it has *not* determined the extent of the comparative demerit or the weight of this factor in relation to other comparative criteria. (A. 90a *et seq.*) Thus, WHDH may again prevail. This possibility is the greater, it should be noted, because all three applicants have been given demerits by the Commission in the area of "Special matters"—WHDH and MBT for improper contacts with Commissioners and GBT for the perjury of its vice-president, general manager, and director in his testimony as to his disbarment. See *WHDH, Inc., et al.*, 22 FCC 767 (1957); A. 90a.

2. If the Commission should decide to award the channel either to GBT or to MBT, WHDH will not be prejudiced in the least by this Court's denial of its interlocutory petition. WHDH has not claimed that it would be foreclosed at that time from raising any of the questions it now seeks to raise, and in any event it is clear that all the questions WHDH now seeks to raise will remain open both in the Court of Appeals and upon appropriate petition for review in this Court. All that will have happened is that

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together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

further proceedings will have taken place which, if there is any prejudicial error in the remanded proceeding to date, might have been avoided. But this is an invariable incident of every denial of interlocutory review. Moreover, in this case the further proceedings will not be burdensome, as they often are in other situations. The Commission does not propose to take further evidence. All that remains is the submission of briefs and the presentation of oral argument.* Thereafter, if review is sought of the questions now sought to be raised, they can be considered much more advantageously than at present in the perspective of their relationship to the Commission's final action.

3. While it is difficult to disentangle from the Petition the precise questions which Petitioner is seeking to present, many of them appear to relate to the propriety of the action of the Court of Appeals on July 31, 1958, in retaining jurisdiction of the appeals by MBT and GBT while at the same time ordering the Commission to conduct further proceedings and report back to the Court. (Question II, pp. 11-13) This is what the Petition calls (p. 12) "a 5 USC 1037(c) type remand", which Petitioner argues is permissible only in "a §402(a) review" and not "in a 402(b) appeal". Most of the discussion under the heading, "Reasons for Granting the Writ", seems to be devoted to this point.** But Petitioner is surely debarred from raising any such question at this—a later interlocutory—stage of the proceeding. Nearly three years have passed since the order in question was made. Petitioner at that time did not chal-

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* WHDH's brief must be substantially completed, for the due date for filing briefs fixed by the Commission's order of July 14, 1960, as amended, expired on September 27, 1960, ten days before the Commission's order was stayed by the Court of Appeals. The due date was extended from September 12 to September 27 as late as August 23, and the Commission denied WHDH's motion for a stay on September 16, 1960. (A. 110a, 111a, 114a).

** Three of five pages of specific argument are devoted to this question.

lenge it, either by petition to the Court of Appeals for rehearing or by petition to this Court for writ of certiorari. Meanwhile, Petitioner has benefited significantly from the very retention of jurisdiction which it now challenges. It invoked the retained jurisdiction affirmatively and obtained relief under it when the Commission sought to proceed in disregard of the Court's direction that the *status quo* be maintained. (A. 114a-116a). In addition, WHDH has had not only the intangible benefit of the protection against precipitate Commission action which the retention of jurisdiction afforded but the very tangible benefit of nine months delay in further proceedings before the Commission during which it has been enabled to continue in profitable operation of its station.

4. Thus, it would appear that the only question which the Petitioner is now in a position to present for interlocutory review is the question whether, assuming the propriety of the Court of Appeals' earlier action in retaining jurisdiction pending the report of the Commission, the Court acted improperly in relinquishing the jurisdiction as it did by its order of January 19, 1961. WHDH has not set forth any exceptional circumstances which would warrant abstracting this question out of the case for interlocutory review at this time, and there are none. Such review would be especially inappropriate at the instance of a litigant who, by its failure to seek such review in 1958 of the principal question which it now seeks to present, has itself recognized the inappropriateness of interlocutory review.

II.

None of the Issues Raised in the Petition Merit the Attention of This Court.

A.

It will help to clarify the medley of questions raised in the Petition if it is observed that these comparative proceedings now stand substantially, and if this Petition is denied will stand exactly, in the posture in which they would have stood if the Court of Appeals in its order of July 31, 1958, had simply remanded the case to the Commission with directions to inquire into the designated matters and to take such further action, if any, as it considered appropriate in the light of the result of the inquiries—if, in other words, the Court had omitted from its order the provisions for the retention of jurisdiction and for the maintenance of the *status quo*.

We do not understand Petitioner to contend that the Court of Appeals lacked power, as of July 31, 1958, to remand the case in the fashion suggested, without retaining jurisdiction. (See Petition, pp. 11-13). The "Questions Presented" in any event do not challenge the power so that under the rules of this Court the question is foreclosed. See Rule 23(c). And under the authorities the power is clear. *E.g.*, *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939); *Fleming* v. *FCC*, 225 F.2d 523 (1955).*

Thus, even if it were to be assumed that the Court below erred in the respects claimed between July 31, 1958, and October 6, 1961, the Court's order of January 19, 1961,

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* To deny the Court of Appeals' power to remand in the circumstances of this case would be to deny it power to deal with vitiating developments which appear dehors the record, surely a preposterous result. See *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956).

would amount as the case stands simply to an expunging of the errors and an establishment *nunc pro tunc* of a situation which the Court could have established in the first place. The Court has relinquished the jurisdiction which it is alleged to have retained without warrant in law, and it has discontinued the asserted "continuous administrative oversight of the Commission's conduct of the remand proceedings" of which Petitioner complains (pp. 13-14). In this light the whole fabric of Petitioner's case dissolves into unimportance.

B.

Separately considered, so far as they can be singled out for separate consideration, the questions presented in the Petition are similarly lacking in that degree of general importance which warrants discretionary review by this Court.

1. The question of the power of the Court of Appeals to remand the case to the Commission for further evidentiary proceedings while at the same time retaining jurisdiction (Question II, pp. 11-13, 16) is substantially moot, for the reasons just stated. For the reasons earlier stated (Point I, supra), the Petitioner is in no position to raise the question at this date, nearly three years late. The question has not been raised at all in the Court of Appeals. Had it been timely raised, in 1958, the Court of Appeals might well have relinquished jurisdiction. Were this Court now, in 1961, to reverse the Court for having failed to do so, it would still be open to the Court to make the order which it then should have made, thus putting the parties and the case right back where they were on July 31, 1958. In that event, all that has happened since then would go for naught. A challenge at this time to the power to remand while retaining jurisdiction would thus

have as its sole effect the unsettling of the small but important group of cases in which questions of undue influence upon administrative decision are currently being explored, in all of which the Court of Appeals retained jurisdiction—a result which surely is not in the public interest.* Furthermore, aside from this group of cases, the Court of Appeals has exercised the challenged power to retain jurisdiction in connection with a remand for further proceedings only once, in *Tuscarora Indian Nation* v. *F.P.C.*, 265 F.2d 338 (CADC 1958). The question has therefore arisen too rarely to assume that degree of general importance which warrants the exercise of this Court's discretionary jurisdiction. In any event, such importance as the question of the power of the reviewing court to retain jurisdiction while directing further administrative proceedings may have concerns the division of function as between court and agency, and ought to be considered and decided, if at all, in a case in which court and agency are presenting opposing points of view.

2. Petitioner also questions "the extent to which the Court may supervise the proceedings before the Commission", assuming a proper remand (Question II, pp. 13-14). Nothing in the present record poses this question in a form which merits the attention of this Court. The Court of Appeals' supervision was circumspect and minimal. (A. 22a-23a, 31a, 32a, 38a). Whether it exceeded permissible bounds turns upon the peculiar facts of this case. The supervision was directed solely to the end of securing a reliable determination of whether there were any vitiating developments. The Commission has not objected, and the Petitioner makes no showing, nor even any claim, that the alleged illegal

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* In addition to this case: *Sangamon Valley Television Corp.* v. *United States*, 268 F.2d 889 (CADC 1959); *United Airlines* v. *C.A.B.*, 281 F.2d 53 (CADC 1960); *WKAT, Inc.* v. *FCC*, 258 F.2d 418 (CADC 1958); *WORZ, Inc.* v. *FCC*, 268 F.2d 889 (CADC 1959).

"oversight" has in any way affected the Commission's conclusion that there ought to be a comparative re-evaluation of the applicants or trenched upon the Commission's ultimate discretion to make an award. Finally, this question too is substantially moot for reasons hereinbefore stated (point II A, supra) and, since complaint is principally made of directions contained in the Court's 1958 order, could have been raised in 1958 (Point I-3, supra).

3. The remaining questions presented by the Petition relate to the propriety of the Court of Appeals' action of January 19, 1961, in vacating the Commission's original decision awarding Channel 5 to WHDH and remanding the case to the Commission for a comparative re-evaluation of the applicants, in accordance with the Commission's recommendation. (Questions I-III, pp. 14-15). Petitioner charges the Court of Appeals with "ex parte approval of contested 'findings' . . . without affording any hearing . . . [and] without reviewing . . . [the] record" and with an arbitrary refusal "to hear and determine the case on the record as supplemented" (pp. 2, 3). But these charges—superficially serious—dissolve into unimportance when it is realized what the Court of Appeals did. The Court of Appeals took purely procedural action—action that, as previously pointed out (Point IIA, supra), it could have taken in the first instance. The Court, it is true, did so without having had briefs or oral argument on the questions involved and without making an evaluation of the evidence which the Commision had found to justify a reconsideration of its award. But it did not "review" the Commission's interim action or take any substantive action with respect thereto. Briefs, argument and review of the record would, therefore, have been superfluous at this stage of the proceeding. Basically, the question is one of timing—whether review is preferable at this juncture or after the Commission has determined the weight of the comparative demerit attaching to WHDH

absolutely and in relation to the other criteria and awarded Channel 5 anew. The Court of Appeals has a wide discretion in the matter, and even were review at the later stage not manifestly superior, the question is not one that merits the attention of this Court. Review is merely being postponed, not denied, and whether review is appropriate at this juncture or later inevitably turns—not upon general principles of law which have significance beyond the facts of this case—but upon the particular facts of this case. Petitioner has not claimed that it would be prejudiced by review of the Commission's interim action after Channel 5 is awarded anew. In any event, it is obvious that it could not be so prejudiced for any question that WHDH could have raised at this juncture will be open later in the Court of Appeals and upon appropriate petition for review in this Court.*

Moreover, the case was before the Court only because of WHDH's Petition for Expeditious Certification of September 16, 1960. WHDH did not in its Petition urge the Court of Appeals to "review" the Commission's interim action. The Petition was directed principally against the action of the Commission in proceeding in defiance of the Court of Appeals' direction that the *status quo* be maintained. By its order of October 7, 1960, staying the Commission's order of July 14, 1960, and directing the Commission to report to the Court within 30 days, the Court sustained this contention. The Court at that time stated that it "may wish to specify issues for briefing and oral

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* The only substantive question in the Petition is Question III. The question is stated abstractly and not with reference to the Commission's findings of improper attempts by WHDH to influence the outcome of the proceeding, and it is inaccurate to the extent it represents that the Court of Appeals approved the Commission's finding that its decision was not tainted by improper influence. The Commission reported only its findings on the specified issues; and only these were approved by the Court. (A. 120a, 124a-126a).

argument or to make such other disposition as may be deemed to be appropriate" after considering the Commission's findings and recommendations (A. 116a), and yet despite this forewarning WHDH made no move to request such a hearing until after the Court's order of January 19, 1961.

Finally, what is involved is not final action by the Commission but only the question whether there is an adequate foundation for the Commission's judgment that the case ought to be reopened and the comparative qualifications of the applicants re-evaluated. If WHDH is correct in the position it now takes in this Court, this question existed at this stage of the case only because the Court of Appeals had erroneously retained jurisdiction, instead of allowing the Commission to proceed as it saw fit in the light of the results of its supplementary inquiry.

III

The Court Below Was Clearly Correct.

Plainly, the order of the Court below entered July 31, 1958, was within its power. This is the teaching of this Court's decision in *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939). This Court there upheld the propriety of a remand by the Court of Appeals to the National Labor Relations Board for the purpose of setting aside its findings and order and making a new decision upon a reconsideration of the entire case. This Court stated as follows (p. 373):

> "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied[4]. Such a remand may be made to permit further evidence to be taken

> or additional findings to be made upon essential points.[5] So, when a District Court has not made findings in accordance with our controlling rule (Equity Rule 70-1/2) it is our practice to set aside the decree and remand the cause for further proceedings.[6] The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements."

See also *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956), where this Court held that the Court of Appeals erred in failing to grant a motion for leave to introduce evidence before the Board that witnesses had perjured themselves. Following this Court's decision in *Ford Motor Co.* v. *NLRB*, the Court of Appeals for the District of Columbia Circuit, in *Fleming* v. *FCC*, 225 Fed. 523 (CADC 1955), upheld its power to remand to the Commission "with directions to reopen the record to the extent necessary to determine the effect of Mr. McNutt's death [which occurred after the appeal was brought but before it was argued] and with authority to revise its decision here." (225 F.2d at 526). The Court stated that the principles enunciated in *Ford Motor Co.* v. *NLRB*

> "are not limited to cases in which an agency has made inadequate findings. They extend to cases where, even without fault of the agency, the state of the record may preclude a 'just result'.[11] The failure of thi-

record to deal with Mr. McNutt's death may have that effect, even if we assume, without deciding, that the record is adequate in all other respects." (205 F.2d at 526.)

The Court of Appeals has since employed the technique of remand in numerous cases, sometimes retaining jurisdiction, sometimes not. E.g *Sangamon Valley Television Corp.* v. *United States*, 268 F.2d 889 (CADC 1959); *Southland Television Company* v. *FCC*, 266 F.2d 686 (CADC 1959); *Tuscarora Indian Nation* v. *F.P.C.*, 265 F.2d 338 (CADC 1958); *United Airlines* v. *C.A.B.*, 281 F.2d 53 (CADC 1960); *WKAT, Inc.* v. *FCC*, 258 F.2d 418 (CADC 1958); *WORZ, Inc.* v. *FCC*, 268 F.2d 889 (CADC 1959).

It is true that *Ford Motor Co.* v. *NLRB* did not involve a retention of jurisdiction by the Court of Appeals, but certainly it cannot be held that the Court had inherent power to remand and relinquish jurisdiction but not inherent power to remand and retain jurisdiction. The teaching of *Ford Motor Co.* v. *NLRB* is that the Court had broad "equitable powers . . . to adjust its relief to the exigencies of the case." (305 U.S. at 373). Surely the Court's order in the instant case was a permissible exercise of its power. It is indeed difficult to conceive of a more compelling case for retention of jurisdiction than one involving charges of impropriety against the agency itself. In cases that do not involve such charges, it is normally necessary only to remand, but where as here there is evidence of an improperly influenced decision it is appropriate, if not essential, to retain jurisdiction too.

Section 7(c) of The Judicial Review Act of 1950 (5 U.S.C. 1037(c)) does not negate the power to retain jurisdiction in connection with an appropriate remand, as urged by Petitioner. Section 7(c), which applies in a Section 402(a) review (47 U.S.C. § 402(a)) but not in a Section 402(b)

appeal (47 U.S.C. § 402 (b)), authorizes the Court of Appeals to order the taking of additional evidence by "the agency," but only upon the application of "a party to the proceeding." It would be unsound to suggest that the Court of Appeals was thereby deprived of its inherent power to remand for the taking of additional evidence *on its own motion* in a Section 402(a) review and even more unsound to suggest that it was thereby deprived of such inherent power in a Section 402(b) appeal. The existence of power to order the taking of additional evidence upon the application of a party in a Section 402(a) review in fact confirms the existence of the inherent power of the Court below to do what it did in the instant case.

The argument that certain of the Court's actions in relation to the further proceedings before the Commission constituted a prohibited "administrative oversight" and an exercise of powers denied to the Commission by amendment to the Radio Act of 1927 merits little attention. Under the Radio Act of 1927, the Court had the power to substitute its judgment for that of the Commission. That power was denied to the Court in 1930 by legislation which limited the Court to "questions of law" and provided "that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall appear that the findings of the Commission are arbitrary and capricious." See *Federal Radio Commission* v. *Nelson Bros.*, 289 U.S. 266, 274-277 (1933).* But the Court has not substituted its judgment for that of the Commission, and it is fanciful to suggest that the Court's minimal and circumspect supervision of the remanded proceeding involved the exercise of any such "administrative" discretion as this Court found to invalidate the judicial review

* The Court below was cognizant of this limitation of its powers (261 F.2d at 65).

provisions of the Radio Act of 1927 in *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 364 (1930).

Finally, the Court below was also clearly correct in deferring review of the Commission's findings and recommendations until a later stage of the proceeding, "in the interest of orderly procedure." (A. 116a).* Of the several cases remanded to the Commission for similar proceedings, this is the only case in which the Court directed that the *status quo* be maintained and denied to the Commission the power to take such further action as it might consider appropriate on the basis of its findings, including setting aside the grant and disqualifying applicants from further comparative consideration. In *WKAT, Inc.* v. *FCC*, 258 F.2d 418 (CADC 1958), the first of the several cases remanded to the Commission for evidentiary hearings with respect to improper influence, the nature and extent of the Commission's powers on remand were not clear from the Court's order. The Commission filed a Petition for Clarification in which it indicated that, in its view, it was not in effect a special master and that it could take such action as it thought was required on the basis of its findings. *WKAT, Inc.* v. *FCC*, Nos. 13,718, 13,725, 14,021, 14,170, Petition for Clarification (reprinted in the Appendix to this Brief). In denying the Petition, the Court stated as follows:

> " . . . the Commission has indicated in its petition a correct understanding of the Court's order of April 17, 1958." *WKAT, Inc.* v. *FCC*, Nos. 13,718, 13,725, 14,021, 14,170, Order denying Petition for Clarification (reprinted in the Appendix to this Brief).

* Having deferred review, there was no point in having the matter briefed and argued or in reviewing the supplementary record.

Thus, the Court here, on the recommendation of the Commission, has merely invested the Commission with the powers which it gave the Commission in the first instance in *WKAT, Inc.* v. *FCC* and in other similar cases. E.g. *WORZ, Inc.* v. *FCC*, 268 F.2d 889 (CADC 1959). That this was a wise procedural course is clear. The proceedings will be significantly expedited, and if WHDH prevails on the comparative re-evaluation, the issues sought to be raised at this juncture will never have to be considered by the Court of Appeals.* In any event WHDH's substantive challenge to the Commission's findings and recommendation will be more appropriately considered after the Commission's comparative re-evaluation of the applicants, at which time the Commission will, for the first time, determine "the significance of the conclusions" in its decision of July 14, 1960, and their "ultimate comparative effect." (A. 103a, 104a).

On the merits, it is clear that the Commission's findings are abundantly supported by the record and that its recommendation is the least that is required in the circumstances. The Court of Appeals "recognized the primary responsibility . . . of the Commission itself" in this matter and in any event the Commission's primary responsibility is clear in accordance with well-established principles. See *Massachusetts Bay Telecasters, Inc.* v. *FCC*, 261 F.2d 51, 62, 67 (1958). It is thus apparent that, if the findings are adequately supported by the record, there is "no basis upon which we may substitute our judgment for that of the Com-

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* MBT, in its Petition For Rehearing of the Court's Decision of July 31, 1958, contended in part that "the Court by the narrowly confining terms of its order, has impeded the expeditious disposition of the case by the Commission . . ." and that the order was unduly restrictive of the Commission and "would entail a needless further delay in the final disposition of this case." Petition of Appellant Massachusetts Bay Telecasters Inc., for Rehearing by the Court Sitting in Banc, or, Alternatively, for Rehearing by the Court, pp. 9, 11

mission. . . . " *Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d at 65. So far as record support for the Commission's findings adverse to WHDH is concerned, there is no substantial disagreement as to the basic facts. The Examiner and the Commission both found that Choate met twice with Chairman McConnaughey, that both meetings were initiated by Choate and arranged and attended by a mutual friend, Mr. Charles Mills, (a member of the Renegotiation Board), that the second meeting was shortly after the Initial Decision (which favored GBT), that there had been no prior social relationship between Choate and McConnaughey, that Choate wanted to establish such a relationship, and that at the second meeting Choate attempted to give the Chairman a memorandum ostensibly in support of legislation which would have abolished the diversification criteria. (A. 43a-46a, 93a-95a). The Examiner concluded that Choate's conduct was not improper and did not reflect adversely upon WHDH from a comparative standpoint, even though he found that the memorandum "was, by its very nature, . . . argument of the diversification issue in the comparative case." Answer to MBT's Proposed Finding of Fact No. 59 (A. 78a). The Commission, being more sensitive to the proprieties, concluded that Choate's purpose was "to demonstrate by his demeanor and presence that he was a responsible man representing responsible interests who merited favorable consideration of their application to conduct an operation in the public interest" and to make an ex parte presentation on the diversification issue—the critical issue in the comparative case—in the guise of a presentation in support of legislation. (A. 100a-101a). The Commission's conclusion as to Choate's purpose is abundantly supported—if not compelled—by the undisputed basic facts. The Commission disqualified three applicants in similar circumstances in *WKAT, Inc.*, 29 FCC 516 (1960), and WHDH is

fortunate that it was not so disqualified, in accordance with the recommendations of the Department of Justice and the General Counsel of the Commission. See p. 5, supra.*

Conclusion

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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* A disposition denying further comparative consideration to WHDH would have found abundant support in numerous decisions of the Commission denying further consideration to an applicant solely on the basis of misconduct which demonstrates its inability to operate a station in the public interest. *Page Boy, Inc.*, 8 RR 1108 (1954), aff'd *Klein* v. *FCC*, 232 F.2d 73 (CADC 1956) (applicant denied comparative consideration whose lack of character qualification appeared from circumstances underlying issuance of fraud order against him by Postmaster General). Cf. *Mansfield Journal Company* v. *FCC*, 180 F.2d 28 (1950) (mutually exclusive applicant engaged in attempt to suppress competition); *Mester* v. *FCC*, 70 F. Supp. 118 (EDNY 1947), aff'd 332 U.S. 749 (1947) (transferees disregarded regulatory laws of government in numerous instances over their entire business career); *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946) (renewal applicant misrepresented and concealed names of stockholders).

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 13,718

WKAT, INC.,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellant,
PUBLIC SERVICE TELEVISION, INC.,
Intervenor.

Case No. 13,725

EASTERN AIR LINES, INC.,
Appellant.
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
PUBLIC SERVICE TELEVISION, INC.,
Intervenor.

Case No. 14,021

WKAT, INC.,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee.
PUBLIC SERVICE TELEVISION, INC.,
Intervenor.

Case No. 14,170

WKAT, INC.,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee.
PUBLIC SERVICE TELEVISION, INC.,
Intervenor.

PETITION FOR CLARIFICATION

On motion of the Federal Communications Commission, appellee in the above-entitled cases, this Court, by Order of April 17, 1958, remanded these cases to the Commission in order for it to conduct an evidentiary hearing and make findings of fact concerning certain public charges which had been made concerning the proceedings before the Commission subsequent to the filing of the appeals herein. The present petition is being filed in view of certain questions which have arisen with respect to the language of the Court's Order as to the exact nature of the Commission's role in these further proceedings.

In its Order of April 17 this Court instructed the Commission to proceed forthwith to hold an evidentiary hearing to determine not only whether the grant of a construction permit to Public Service Television was void *ab initio* or voidable because a member of the Commission should have disqualified himself, but also to determine whether any of the applicant parties were disqualified by reason of their misconduct in either attempting to influence any member of the Commission or by directly or indirectly securing, aiding, confirming, ratifying or knowing of any such action. The Court also made clear that all parties to the proceedings before the Commission were to be permitted to participate in the evidentiary hearing ordered by the Court and that, in addition, any person concerning whom evidence was received should be permitted to cross-examine and submit rebuttal testimony if he so requested.

With all of the above the Commission takes no issue, nor does it object to the fact that, pending these further proceedings, the Court is retaining jurisdiction over the appeals and has directed the Commission to make interim reports to the Court as to its progress in carrying out the Commission's responsibilities on remand. A question is raised, however, by the language of the Court's Order

insofar as it talks in terms of the Commission making findings of fact as a result of the evidentiary hearing to be conducted and "to report its findings of fact to this Court and recommend to this Court such disposition of these appeals as seems to it necessary or desirable in view of its findings of fact."

We believe the Court's language can and should be interpreted, in view of the Commission's basic responsibilities under the Communications Act of 1934, as amended, as authorizing the Commission in the light of such basic findings as it might make, to reach ultimate findings or conclusions, subject to judicial review, as to whether the grant should be set aside because a participating Commissioner should have disqualified himself and also as to whether one or more of the parties should be disqualified from further comparative participation in the proceeding because of actions taken, sponsored or condoned by them. But while we should, in the absence of further court order, proceed on this basis, we recognize that the Court's language is also capable of a more limited construction under which the Commission would, in effect, operate merely as a "special master" for the Court. This petition has been filed to avoid any doubts about the matter.

As was indicated in the oral argument on the Motion to Remand, Section 402(b)-(j) of the Communications Act, unlike a number of other statutory provisions governing appeals from administrative agencies, does not expressly provide the procedure by which cases may be remanded prior to their determination on the merits for further proceedings before the agency in the light of new developments. However, Section 7(e) of the Hobbs Act, 5 U.S.C. 1037(e), governing the procedure to be followed for petitions for review of Commission actions under Section 402(a) of the Communications Act, provides:

> (c) If a party to a proceeding to review shall apply to the court of appeals, in which the proceeding is pending, for leave to adduce additional evidence and shall show to the satisfaction of such court (1) that such additional evidence is material, and (2) that there were reasonable grounds for failure to adduce such evidence before the agency, such court may order such additional evidence and any counter-evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken and may modify or set aside its order and shall file a certified transcript of such additional evidence, such modified findings or new findings, and such modified order or the order setting aside the original order.

We think what is explicit with respect to petitions for review under Section 402(a) of the Communications Act is implicit with respect to appeals under Section 402(b) of the Communications Act.

The Commission is fully in agreement with the Court that the public charges of alleged attempts at improper influence present a very serious matter going to the very heart of the Commission's quasi-judicial powers. It is for this reason that the Commission filed its remand motion. The seriousness of the matter, however, and the nature of the problem involved cannot, in our opinion, relieve the Commission of its obligation under the Act to determine initially the competence to participate of its individual members and the basic qualifications of applicants for radio and television facilities. While such determinations are, of course, subject to review by this Court, we do not believe that it would be appropriate for them to be made, in the first instance, by the Court. Nor, assuming

arguendo that one or more of these determinations could be made originally by the Court upon the basis of findings of fact developed at an evidentiary hearing, do we believe that any authority exists for directing the Commission to serve in the capacity of "special master" for the Court.

Accordingly, in the interest of avoiding doubts and further litigation on this matter the Commission believes it would be appropriate for the Court to amend its Order of April 17, 1958, or to take other appropriate action in order to make clear that in issuing its order on remand the Court was not attempting to preclude the Commission, on the basis of the findings of fact it makes in the evidentiary hearing, from setting aside the basic grant if it determines that a participating Commissioner should have been disqualified or from determining that one or more of the applicants below are or are not, as a result of their actions, disqualified from further consideration for the grant of the television station in issue. Such a determination, of course, would not in any way affect the obligation of the Commission to make recommendations to this Court with respect to the disposition of the present appeals in the light of any conclusions it may make. Nor is this motion intended as a substitute for or to toll the time within which the Commission will within six weeks report back to the Court, pursuant to the final paragraph of the Order of April 17, 1958, as to its progress in complying with the hearing actions required by the Court's Order.

Respectfully submitted.

WARREN E. BAKER
General Counsel
RICHARD A. SOLOMON
Assistant General Counsel
JAMES T. BRENNAN
Counsel
Federal Communications Commission

April 30, 1958

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1958
Book 61 page 483

No. 13,718, 14,021 and 14,170

WKAT, INC.,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
PUBLIC SERVICE TELEVISION, INC.,
Intervenor.

No. 13,725

EASTERN AIR LINES, INC.,
Appellant,
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
PUBLIC SERVICE TELEVISION, INC.,
Intervenor.

Before: PRETTYMAN, WASHINGTON and DANAHER, *Circuit Judges*, in Chambers.

ORDER

The Commission has filed a petition for clarification. However, the Commission has indicated in its petition a correct understanding of the Court's order of April 17, 1958. The Commission also correctly indicates that the procedure contemplated by the Court is in accord with the intent of Section 7(c) of the Hobbs Act, 5 U.S.C. §1037(c), and that accordingly the Commission will report to the Court its findings upon the additional evidence which will be adduced and will also report its modified order, if any, or the order, if any, setting aside the or

ginal order, and that the Commission will make recommendations to the Court with respect to the disposition of the present appeals in the light of its findings and of its proposed order or orders. The Commission's motion accurately reflects the Court's intendment that in the proceedings to be conducted the Commission is not to operate merely as a "special master" for the Court. It therefore appears that no clarification of the Court's order is necessary. The petition is denied.

Per Curiam.

Dated: May 12, 1958

EBP JAD

TPW

In the

Supreme Court of the United States

BRIEF OF GREATER BOSTON TELEVISION CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 838

WHDH, Inc., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, MASSACHUSETTS BAY TELECASTERS, INC., AND GREATER BOSTON TELEVISION CORPORATION, *Respondents*.

BRIEF OF GREATER BOSTON TELEVISION CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief will address itself to Questions I, II and III as set forth on pages 2 and 3 of the Petition.

I.

The only real question presented here is whether the court below exceeded its power in entering its order of January 19, 1961, (A. 124a) without first affording the parties an additional opportunity for briefs and oral argument.

Greater Boston submits that the time for briefs and argument with respect to the demerits assigned to WHDH and MBT, and the weight to be attached to such demerits, will come at a later date, after the Commission has reconsidered the case and entered a new final order therein. If WHDH is aggrieved by the new final order—if, for example, the new order grants the application of Greater Boston and denies the application of WHDH—WHDH can appeal from the order and have its day in the Court of Appeals at that time.

This would be entirely consistent with the regular practice before the Commission. In the ordinary comparative case the Commission assigns demerits, based on the record, and weighs them in the balance against all the other criteria relevant to such cases, and all this is done before the demerit comes before the Court of Appeals. In other words, a party has no right to a hearing in the Court of Appeals on the assignment of a demerit to him unless and until it appears that the demerit has hurt him. If, in spite of the demerit, he is found by the Commission to be entitled to a grant of his application, he is not aggrieved by the order granting his application.

II.

The court below made it plain in its decision of July 31, 1958 (A. 23a) that it was following procedure laid down in 5 U.S.C. 1037 (c) in its remand order. If Petitioner thought that such a remand exceeded the power of the Court of Appeals, it should have asked this Court to intervene at that time. Instead, it participated in the proceedings pursuant to the remand—indeed, it exulted in them after Judge Stern's Initial Decision and before the decision of the Commission reversing Judge Stern—and only after it realized it had been hurt, perhaps irreparably, in such

proceedings did it come to this Court to complain about the procedure. In its petition it weeps crocodile tears about 30 months from January 1956 to July 1958 being "completely wasted", but it is now almost 33 months since the Court of Appeals cited 5 U.S.C. 1037 (c) as a procedural guide for the remanded proceedings. If there is any merit to question II as presented in the petition, it should have been raised by asking this Court to review the July 31, 1958 order of the Court of Appeals. The present order sought to be reviewed—the order of January 19, 1961—does not invoke 5 U.S.C. 1037 (c). It merely vacates the Commission's order of April 25, 1957 and remands the case for further proceedings before the Commission.

Under question I, this Petition is premature. Under question II, the Petition is too late.

III.

Question III is not fairly stated in terms of the record in this case.

In the first place, the court below did not "hold" that the record on appeal required affirmance of the Commission. The only thing the decision of July 31, 1958 "held" was that further evidentiary hearings were required to determine whether or not there had been misconduct in connection with the case and, if so, the extent of it. (A. 25a). Parts I through V (A. 4a-19a) of that decision are no more than dicta which would have been better left unsaid at that time, according to then Chief Judge Edgerton (A. 27a). So far as can be known at this time, Parts I through V represent the views of two of the Judges of the nine man Court of Appeals. It has not yet been timely, and probably never will be, to present the questions raised in the original appeal to the full membership of the Court of Appeals.

In the second place, to say that the Court of Appeals has approved a Commission determination that the Commission's decision was untainted by any improper influence is an outrageous oversimplification and removal from context which amounts to a complete misrepresentation. The Commission's conclusions as a result of the proceedings pursuant to remand are set forth in full (A. 99a-104a) and should be read in full. They are restated in the Commission's report to the Court of Appeals (A. 122a-123a). They were again summarized and slightly restated by the Court of Appeals in its decision of January 19, 1961 (A. 125a-126a).

Petitioner's purported summary of these conclusions in its phrasing of question III is an attempt to mislead this Court. Question III is not deserving of any answer because it is based on two premises, both of which are false.

IV.

Respondent Greater Boston believes one other point is worthy of mention. The Petition would give the impression that there is conflict between the Court of Appeals and the Commission with respect to the Court's excessive supervision of the administrative process, or interference with the Commission in the exercise of the powers conferred on it by the Congress.

In fact, the Commission and the Court of Appeals are in complete agreement and harmony in this case. Indeed, it should be pointed out that, while the Petition speaks of the action of the Court of Appeals in vacating the order of the Commission and in fact the Court of Appeals did order the Commission's order vacated (A. 126a), the order had *already* been vacated six months earlier by the Commission itself (A. 104a).

The only party contending that the case is not being

properly handled by both the Commission and the Court of Appeals is Petitioner who, by the mere filing of this petition, has delayed by months the reconsideration of this case by the Commission. Such eventual reconsideration is inevitable, but it may not be without significance that Petitioner is in the meantime continuing to operate Channel 5 in Boston and reaping whatever profits may be made from this operation.

Conclusion

For reasons set forth above, the petition should be denied.

Respectfully submitted,

J. Joseph Maloney, Jr.
Attorney for Respondent,
Greater Bostor Television
Corporation

Proof of Servic

I, Beverly L. James, a secretary in the office of Roche, Leen & Maloney, attorneys for the respondent Greater Boston Television Corporation, on oath state that on April 19, 1961, I served a copy of the foregoing Brief in Opposition to Certiorari on the Solicitor General of the United States; WHDH, Inc., Petitioner herein; Federal Communications Commission, Respondent herein, and Massachusetts Bay Telecasters, Inc., Respondent herein, by mailing copies, in duly addressed envelopes, with first class postage (or air mail postage, as indicated) prepaid, as follows:

To: Solicitor General
Department of Justice
Washington 25, D. C.—air mail postage

To: John L. Fitzgerald, Esq.
General Counsel
Federal Communications Commission
Washington 25, D. C.—air mail
To: Dempsey & Koplevitz, Esqs.
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Attorneys for Respondent
Massachusetts Bay Telecasters, Inc.

BEVERLY L. JAMES

Boston, Mass. April 19, 1961

Then personally appeared Beverly L. James and made oath that the foregoing affidavit was true.

Before me,

ROBERT Y. SHERER
Notary Public
Commonwealth of Massachusetts
My commission expires
September 11, 1965

FILE COPY

Office Supreme Court, U.S.
FILED
APR 20 1961
JAMES R. BROWNING, Clerk

No. 838

In the Supreme Court of the United States

OCTOBER TERM, 1960

WHDH, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. 1a–24a)[1] remanding the cases to the Federal Communications Commission for further hearing is reported at 261 F. 2d 55. The court's order (Pet. App. 124a–126a) approving the Commission's Report and Recommendation on remand, vacating the Commission's order on appeal, and remanding the case for further comparative hearing has not been officially reported. The original decision and order of the Commission are reported at 22 F.C.C. 761. The Commission's

[1] The petitioner has filed a separate appendix to the petition, referred to as "Pet. App."

decision on remand (Pet. App. 90a–108a) is reported at 29 F.C.C. 204, and its opinion and order denying rehearing (Pet. App. 117a–120a) at 29 F.C.C. 986.

JURISDICTION

The order of the court of appeals remanding the cases to the Commission was entered on July 31, 1958. The order of the court approving the Commission's Report and Recommendation on remand, vacating the order of the Commission on appeal, and remanding the proceeding for further comparative hearing was entered on January 19, 1961. Rehearing was denied on February 16, 1961. The petition for a writ of certiorari was filed on March 21, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 47 U.S.C. 402(j).

QUESTION PRESENTED

The court of appeals, though otherwise approving a decision of the Federal Communications Commission making an award to petitioner in a comparative television proceeding, remanded the case for further hearing to establish the facts, and make recommendations, with respect to allegations that during the Commission proceedings the principals of some of the applicants, including the petitioner, had made *ex parte* representations to a Commissioner. After hearing, the Commission reported to the court its findings that two of the applicants, including the petitioner, were responsible for *ex parte* attempts to influence the Commissioner. These activities, the Commission reported, rendered the grant to petitioner voidable and required a new comparative evaluation in which the

ex parte actions would reflect adversely upon the responsible parties. The court of appeals approved the Commission recommendation, vacated the original Commission grant to petitioner, and remanded the case for Commission re-evaluation of the comparative qualifications of the applicants on the basis of the original record as supplemented by the record on remand. The question now presented is:

Whether the court of appeals had authority to vacate the original Commission decision and remand the case for further comparative determination where (a) the matter upon which the remand was based was first raised *sua sponte* by the court, and (b) the court approved the report and recommendation of the Commission on remand without briefing and oral argument.

STATUTES INVOLVED

Pertinent sections of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*) and of the Judicial Review Act of 1950 (64 Stat. 1129, 5 U.S.C. 1031–1042), are set forth in the petition (pp. 19–23).

STATEMENT

On April 25, 1957, the Commission rendered its decision (22 F.C.C. 761) after a comparative hearing for a new television station on Channel 5, Boston, Massachusetts. The Commission granted the application of petitioner, WHDH, Inc., and denied the competing applications of Greater Boston Television Corporation (Greater Boston), Massachusetts Bay Telecasters, Inc. (Massachusetts Bay), and Allen B. DuMont Laboratories, Inc. Appeals to the court

below, in which petitioner WHDH was granted leave to intervene, were taken by Greater Boston and Massachusetts Bay under Section 402(b) of the Communications Act (Pet. 19).

On July 31, 1958, the court of appeals issued its decision ruling that it would have affirmed the Commission on the basis of the record on which the Commission had decided the case but that a remand to the Commission for further hearings was required by the indication of after-discovered circumstances which, if established, went to the core of the Commission's quasi-judicial powers (Pet. App. 1a–24a). The court noted that, subsequent to the Commission's disposition of this proceeding, testimony by a member of the Commission before the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce indicated that various individuals connected with some of the parties to the proceeding had conferred with him with reference to the case while the matter was still under consideration by the Commission (Pet. App. 20a–24a).[2] In the light of this testimony, the court of appeals remanded the case to the Commission to hold an evidentiary hearing and make findings on the following issues (Pet. App. 25a–27a):

> (1) Whether or not any *member* of the Commission should have disqualified himself in the present case;
>
> (2) Whether any *person* or *persons* influenced or attempted to influence any member of the

[2] The transcript of the Congressional hearings had been lodged with the court by the Commission in connection with another case (Pet. App. 20a).

Commission in any manner whatsoever except by the recognized and public processes of adjudication (see *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, 534–35, 540–41 (3rd Cir. 1958), and if so, the full facts and circumstances;

(3) Whether any *party* to the proceeding before the Commission directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct which may be found by the Commission to have occurred;

(4) Whether or not in the light of such findings, the grant of a permit for Channel 5, Boston, was void *ab initio* and if not, is voidable and action should be taken to set it aside, and whether any one applicant or more than one may have been disqualified to receive a grant of its application; and

(5) Whether the conduct of any party-applicant if not of a disqualifying character, has been such as to reflect adversely upon such party-applicant from a comparative standpoint.

The court further directed that the *status quo* in these cases be maintained pending its further order, and retained jurisdiction of the appeals pending receipt of the findings and final report of the Commission (Pet. App. 26a).

Pursuant to the remand, the Commission designated the matter for hearing before a special hearing examiner, retired Chief Judge Horace Stern of the Pennsylvania Supreme Court. On September 23, 1959, the hearing examiner rendered an initial decision which proposed to affirm the Commission's grant to petitioner WHDH, Inc. (Pet. App. 40a–65a). Following

exceptions and oral argument, the Commission on July 14, 1960, issued its Decision and Order determining that the grant to petitioner WHDH was voidable and should be set aside (Pet. App. 90a–108a). The Commission found that principals of WHDH and Massachusetts Bay had attempted to influence its original decision by means other than the recognized and public processes of adjudication and that their conduct, while not disqualifying, was such as to reflect upon them adversely from a comparative standpoint (Pet. App. 99a–103a). It further concluded that vacation of the grant to petitioner WHDH was warranted to protect the integrity of the Commission's processes (Pet. App. 101a–102a). Accordingly, the Commission's order vacated its April 1957 grant to petitioner, scheduled further proceedings to reevaluate the comparative positions of all the applicants, and granted petitioner special temporary authority to continue its operations on Channel 5 pending a final order of the Commission (Pet. App. 104a).

On July 21, 1960, the Commission filed a "Further Report of Progress" with the court of appeals, stating that it did not view its Decision and Order of July 14, 1960 as the "final report" required by the court's remand order of July 31, 1958, and that such final report would be submitted upon completion of the further comparative proceedings (Pet. App. 109a–110a). By order of October 7, 1960, the court of appeals stayed the effectiveness of the Commission's order of July 14, 1960, pending further order of the court, and directed the Commission to submit its findings and recommendations on the specified remand

issues within thirty days (Pet. App. 115a–116a). The court stated that this action was required in the interest of orderly procedure and to give effect to its July 31, 1958, order directing the preservation of the *status quo* pending the court's further action (Pet. App. 116a). The court further stated that, after considering the findings and recommendations of the Commission, it might "wish to specify issues for briefing and oral argument or to make such other disposition as may be deemed appropriate" (*ibid.*).

On November 7, 1960, the Commission filed its "Report and Recommendation" in the court of appeals (Pet. App. 120a–124a). On the basis of its Decision of July 14, 1960, and a Memorandum Opinion and Order of November 1, 1960 denying rehearing, the Commission reported its findings and conclusions on the issues specified by the court as follows (Pet. App. 122a):

ISSUE 1

No member of the Commission, who participated in the instant case, should have disqualified himself.

ISSUE 2

There were attempts to influence members of the Commission, but no actual influence occurred. Robert B. Choate, a principal of WHDH, Inc., and Forrester A. Clarke, a principal of Massachusetts Bay Telecasters, attemped to influence the Commission's original decision of April 25, 1957, by means other than the recognized and public processes of adjudication. Moreover, William Davis Taylor and John S. Taylor, respectively the president and

vice-president of Globe Newspaper Company (which was not an applicant in this proceeding), made calls on each of the Commissioners in an attempt to prevent an award to WHDH. No member of the Commission was in fact influenced by any of the foregoing activities. The full facts and circumstances surrounding such activities are set forth in our Decision of July 14, 1960 and Memorandum Opinion of November 1, 1960.

ISSUE 3

Robert B. Choate is a principal of WHDH, Inc. and Forrester A. Clarke is a principal of Massachusetts Bay Telecasters. Their conduct is accordingly attributable to such parties. Globe Newspaper Company was not an applicant in this proceeding and its representatives did not act in connivance with any applicant.

ISSUE 4

In the light of the findings on the above issues and all the circumstances, we have concluded that the grant to WHDH was not void *ab initio* and that none of the applicants is disqualified to receive a grant of its application. We have, however, concluded that the grant to WHDH is voidable and that action should be taken to set it aside.

ISSUE 5

The conduct of WHDH and of Massachusetts Bay Telecasters, while not disqualifying, has been such as to reflect adversely upon such applicants from a comparative standpoint.

The Commission recommended that, in accordance with the views expressed in its Decision and Memorandum Opinion, the court remand the entire matter to the Commission in order that it might set aside the grant to petitioner, conduct further comparative proceedings, and make a new determination (Pet. App. 124a).

By order of January 19, 1961, the court of appeals, after consideration of the Commission's findings and recommendation, approved them (Pet. 124a–126a). The court's order vacated the Commission's original order of April 25, 1957, which had granted a permit to petitioner, and remanded the proceedings to the Commission in order that it might reevaluate the comparative positions of the applicants on the basis of the record as supplemented and make a new determination in the light thereof, and take such further action, if any, as the Commission should deem appropriate (Pet. App. 126a). On February 16, 1961, the court of appeals denied petitioner's petition for rehearing and other relief (Pet. App. 126a).

ARGUMENT

The petition seeks review of an order directing further proceedings before the Federal Communications Commission in order to enable the Commission to determine the impact of new information going to the heart of the comparative evaluation of the applicants. This order was well within the scope of the court's authority in reviewing administrative action. Furthermore, it is interlocutory, and petitioner has shown no reason warranting review by this Court prior

to final action by the Commission and subsequent review by the court of appeals.

1. The 1958 and 1961 remand orders of the court below are in accord with "familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied" or "to the end that valid and essential findings may be made." *Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364, 373, 374. The ends of justice obviously demanded that course here. The testimony before the Legislative Oversight Subcommittee to the effect that petitioner and other persons had conferred with Commissioners *ex parte* during the pendency of the quasi-judicial administrative proceeding, was ample justification for the court's 1958 order that the Commission supplement the record on appeal as to these matters which first came to light after the Commission's decision was on appeal.[3]

Indeed, the course followed by the court of appeals was completely in accord with the action of this Court in *WORZ, Inc.* v. *Federal Communications Commission,* No. 349, October Term, 1958, and *Sangamon Valley Television Corp.* v. *United States,* No. 235, October Term, 1958. In those cases, where certiorari was sought to review orders of the court of appeals affirming Commission decisions, this Court, upon representations by the Solicitor General concerning conduct similar to that involved here, vacated the

[3] Petitioner did not seek review by this Court of the 1958 order of the court of appeals which first remanded the case to the Commission for additional proceedings.

judgment of the court of appeals and remanded for such action as might be appropriate. *WORZ, Inc.*, 358 U.S. 55; *Sangamon Valley Television Corp.*, 358 U.S. 49.

Petitioner's contention (Pet. 12–13) that the court of appeals lacked power to remand for additional evidence, in the absence of an express authorization in the review provisions of Section 402(b) of the Communications Act, is analogous to the argument concerning the court's stay powers under the then language of Section 402(b) which was rejected in *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4, 11–14, 16–17. The review provisions are not to be read so narrowly and rigidly.

For the same reason, the fact that Section 402(a) of the Communications Act provides for review of some other types of Commission orders under Section 7(c) of the Judicial Review Act of 1950, 5 U.S.C. 1037(c), which specifically authorizes a remand without reversal, does not help petitioner. The court of appeals correctly determined below (Pet. App. 23a) that "what was explicit as an added procedural course in a section 402(a) review was implicit in the exercise of our review function * * * in a section 402(b) appeal." Absent an express statutory prohibition, the reviewing court is not deprived of conventional and appropriate "means for vindicating the public interest" or for preserving the integrity of the administrative and judicial process. *Scripps-Howard, supra*, 316 U.S. at 15; *United States* v. *Shotwell Manufacturing Co.*, 355 U.S. 233, 241, *et seq.*; *Flem-*

ing v. *Federal Communications Commission*, 225 F. 2d 523, 526 (C.A.D.C.).

2. If the court of appeals' action of January 19, 1961, approving the Report and Recommendation of the Commission (Pet. App. 124a–126a) constituted a final determination of the validity of the Commission holding that the actions of petitioner WHDH's principal in engaging in two *ex parte* conferences with former Chairman McConnaughey was improper, and, while not disqualifying, required a new comparative evaluation of the applicant's qualifications, we should agree that serious questions ripe for review might well be presented since petitioner did not have an opportunity to present its case on these issues to the court of appeals. The fact that WHDH might nevertheless prevail on the new hearing, under the new criteria, would not deprive the court's order of finality any more than is normally the case where a final Commission decision on the merits is set aside and the case remanded for further proceedings (in the light of the court's opinion) which might result in reaffirmation of the original award. See Communications Act, Section 402(j), 47 U.S.C. 402(j).

But we do not read the court's order as being intended to have, or as having, the effect of passing judicially in any way upon the consequences of petitioner's actions as found by the Commission. Rather, the court was merely clearing the way toward the new hearings which the Commission desires to hold. In 1958, the court, in remanding, could have expressly provided that *if* the Commission should determine that the *ex parte* contacts, although not disqualifying,

required a new comparative hearing, the Commission could undertake such a new hearing. If that had been the court's order in 1958, there would be no doubt that after making the appropriate findings the Commission could set a new hearing, without seeking further permission of the court, and the whole matter would thereafter be open for judicial review upon the new order entered by the Commission at the close of that new hearing. In our view, that is all that the court has done here, in 1961 instead of 1958. It has given the Commission permission to hold the new hearing which the Commission believes necessary, but the court itself has not passed upon the evidence or the findings which led the Commission to conclude that a new hearing should be held.

If the court had intended finally to pass upon the validity of the Commission's determinations as to the effect of the actions of WHDH and Massachusetts Bay upon the validity of the original decision and their respective applications, it surely would have done so only after permitting all parties to be heard.[4] Such a hearing, by brief or oral argument, would have provided an opportunity for the parties to argue that the conduct revealed by the record on remand[5] either required the absolute disqualification of one or more

[4] As well as the *amicus*, the United States, which on October 14, 1960, had been permitted to intervene "to file briefs and to participate in oral argument" (Pet. App. 117(a)).

[5] The clerk's office of the court of appeals has advised us that while the Commission transmitted the record on remand to the court for filing on November 7, 1960, it has not in fact as yet been accepted for filing. It would appear, therefore, the Commission record on remand was not before the court when it adopted the order here in question.

of the parties (as other parties were urging) or that no impropriety, and hence no comparative demerit, was involved (as WHDH and Massachusetts Bay were arguing with respect to themselves). This is the procedure which the court of appeals followed in another case involving allegations of *ex parte* representations (the Channel 10 Miami proceeding, see *WKAT, Inc.* v. *Federal Communications Commission*, 258 F. 2d 418 (C.A.D.C.)), upon which the Commission made its report on remand at approximately the same time as the one in this case. It seems clear that the court's failure to hear argument here was because it intended to defer all such considerations pending the outcome of the further hearing by the Commission, and that it adopted a different procedure in the other *ex parte* case (*WKAT, Inc., supra*) involving the Commission because there it had been proposed to disqualify all but one party and no further Commission proceedings were contemplated.

Accordingly, petitioner's contentions (Pet. 10–17) present nothing warranting review by this Court prior to final Commission action in the renewed comparative proceeding and any subsequent review by the court of appeals. Petitioner has not shown any compelling need for an immediate determination,* or that it

* The fact that the court, in its January 19, 1961 order, vacated the Commission's original grant (as the Commission had stated it intended to do itself (Pet. App. 124a)) does not jeopardize petitioner WHDH's position. WHDH has remained in operation and the Commission has announced its intention of granting WHDH special temporary authority to continue operation on Channel 5 in Boston pending the final order of the Commission in the renewed comparative hearing (Pet. App. 104a, 109a, 124a; see R. 1172D). The court of

would be precluded from asserting these challenges should its application ultimately be denied. Under these circumstances review now would thwart the longstanding Congressional policy against piecemeal appeals and delay the further proceedings before the Commission. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 50–51. Cf. *Cobbledick* v. *United States*, 309 U.S. 323, 324–326; *United States Alkali Ass'n.* v. *United States*, 325 U.S. 196, 202–203; *Parr* v. *United States*, 351 U.S. 513.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Federal Communications Commission.

APRIL 1961.

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appeals' order of January 19, 1961, does not require cessation of operations by WHDH. On the contrary, to the extent that any court authorization for continued WHDH operation may be deemed necessary, it is provided by the final provision of the order authorizing the Commission to "take such further action, if any, as the Commission shall deem appropriate" (Pet. App. 126a).

U. S. GOVERNMENT PRINTING OFFICE: 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. [illegible]

WHDH, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 838

WHDH, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER

Respondents' basic contention seems to be that since the court below decided nothing, it cannot have decided anything erroneously. The Commission's brief (p. 11) concedes that the court below would have been required

to afford petitioner a hearing had its order approving the Commission's Report and Recommendations constituted a holding that such findings were correct. The Commission's position is that the court below had alternative procedures open to it when presented with the Commission's "findings": (a) to give petitioner (and the other parties) a hearing on the question of whether there is any legal or factual basis in the remand record for vacating the Commission's 1957 award to petitioner; or (b) to vacate the order summarily without making any determination as to whether there is either a legal or factual basis in the record for so doing. The court followed the latter course which the Commission characterizes as "in accord with 'familiar appellate practice to remand causes for further proceedings without deciding the merits,' . . ." (Br. p. 10).

No precedent has been cited to support the contention that it is "familiar appellate practice" to vacate an administrative order granting a license or permit, without notice or hearing to the permittee, solely on an *ex parte* representation that the agency involved would like to give the issuance of the permit further consideration. In every case cited in the Commission's brief and in every other case we have been able to find, remands to the FCC for consideration of newly discovered evidence have been made only after hearing contentions of the interested parties concerning the existence of the alleged new facts and their significance. The action of the court below in the instant case in accepting respondent Commission's representations and refusing to hear petitioner with respect to such representations and refusing to consider the record on

which the Commission's representations were allegedly based is unprecedented.[1]

The order of the court below cannot be insulated from this Court's review by the device of characterizing it as "interlocutory". A judgment entered summarily is no less final than a judgment entered after hearing. Only be assuming that the proceedings in the court below were part of the administrative process as distinguished from the judicial process can the court's order correctly be termed "interlocutory". The adminstrative process ends and the judicial process begins when an appeal from a Commission order is filed in the court below (47 U.S.C. 402(c)) and the judicial process ends (except for review in this Court) when the court below enters an order disposing of that appeal (47 U.S.C. 402(j)). The jurisdiction of the court below is limited, this Court has said, to judicial as distinguished from administrative functions and review by this Court

[1] The Commission brief (p. 14) attempts to distinguish the court's action in calling for briefs and scheduling oral argument in the Miami Channel 10 proceeding on the ground that in that case "no further Commission proceedings were contemplated". The Commission does not, however, advert to the order of the court below to the same effect entered in *Sangamon Valley Television Corp. v. United States of America* and *Federal Communications Commission, et al.*, No. 13,992 on April 17, 1961 (reprinted as an appendix hereto). In the *Sangamon* case, hearing was ordered notwithstanding request by the Commission to follow the procedure first utilized in this case, i.e., entry of an order terminating the judicial proceedings in the court below and remanding to the Commission for further administrative proceedings without consideration of the record and without hearing the parties. The fact remains that whatever may be the differences in the various cases, the one consistent thread running through all of them except this one is that the court has afforded a hearing to the parties before taking final action on the appeal, as it did in this case by its January 19th order.

is limited to a determination of whether the court below properly exercise the limited judicial function conferred on it in appeals taken under Section 402(b) of the Commmunications Act (*Nelson Bros.* v. *Federal Communications Commission,* 289 U.S. 266, 276). The order of the court below vacating the Commission's order on appeal is no more interlocutory than was the "final action" of the Court of Appeals for the Sixth Circuit "in remanding the cause for further proceedings to the Board" which was the subject of this Court's review in *Ford Motor Company* v. *National Labor Relations Board,* 305 U.S. 364, 370. The necessity for clarifying the confusion between the functions of the court below and those of the Commission epitomized in the description of the court's January 19, 1961, order vacating petitioner's permit as "interlocutory" is perhaps the most important reason for the issuance of the writ in this case.

We concede that it would not have invalidated the court's July, 1958, remand order had that order contained an explicit requirement that the Commission report its conclusions as to whether the remand evidence would require a different comparative award. On the contrary, it has been petitioner's view that such a requirement was in fact implicit in the order. We most certainly do not concede, however, that had the court below in 1958, on the basis of what it read in the pleadings in another case, *vacated* the Commission's order granting petitioner's permit without affording any hearing to petitioner, such action would have been any more valid than is its January 19, 1961, order. The court's 1958 remand order was purely interlocutory. It provided for maintenance of the *status quo* and prohibited any tampering with the Commission's order

granting petitioner's permit. Petitioner suffered no hurt through the holding of hearings or the prosecution of inquiries concerning the existence of any possible impropriety on petitioner's part in the prosecution of its original application. Until the court below acted to disturb the *status quo*, petitioner was in no position to claim injury at its hands.[2]

Scripps-Howard Radio v. *Federal Communications Commission*, 316 U.S. 4, relied on by the Commission to support the court's July 1958 remand is neither analogous nor apposite. This Court held there that the court below had the inherent equitable power of a court of first instance to maintain the *status quo* in dealing with a case questioning the legality of a Commission authorization. The decision contains no suggestion that absent specific statutory authority the inherent equitable power of a court of first instance extends to the direction and supervision of supplementary administrative proceedings related to a matter before it and over which it continues to maintain jurisdiction. In *Ford Motor Company, supra*, the remand order involved was one terminating the court's jurisdiction and reinvesting the Labor Board with administrative jurisdiction. No supervision of subsequent Labor Board proceedings was contemplated.

Judge Stern addressed himself squarely to the question of whether any of the facts developed in the remand proceedings justify a different result in the proceedings before the Commission than was reached in its April, 1957, decision and order granting petitioner's

[2] The court below clearly recognized that the impact on petitioner of alteration of the *status quo* was not merely academic in its October 7, 1960 order (A. 114a), staying the Commission's order of July 14, 1960 (A. 104a), purporting to vacate the Commission's April 24, 1957, order granting petitioner's television application.

television application. He concluded, without qualification, that none of such evidence justifies a different result (A. 64a-65a). The Commission, reviewing Judge Stern, did not address itself to the question of whether the remand evidence justified or required a different result but contented itself with concluding that the evidence justified a new comparative evaluation (A. 90a-104a). As is plain from its representations to this Court, the Commission construes its decision as leaving completely open the question whether the new evaluation will produce the same result as did its original evaluation. The action of the court below, despite this, in summarily vacating the order which it had found the Commmission correctly entered on the record then before it, denies petitioner due process in a radical departure "from the accepted and usual course of judicial proceedings". It is no answer to the violation of petitioner's right to have its award remain in effect unless and until some illegality in it is found, to say that it may again prevail and win a new award in a new proceeding before the Commission.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1960

No. 13,992

SANGAMON VALLEY TELEVISION CORPORATION, *Petitioner*,

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
Intervenor,

SIGNAL HILL TELECASTING CORPORATION, *Intervenor*,
PLAINS TELEVISION CORPORATION, *Intervenor*.

Before: EDGERTON, FAHY and BASTIAN, *Circuit Judges*, in Chambers.

Order

Upon consideration of the Report and Recommendation of the Commission, submitted to this court February 17, 1961, and of the several memoranda which have been filed with the court regarding that Report and Recommendation, it is

ORDERED by the court that the parties to this case are allowed to file printed briefs setting forth their views regarding the memoranda, the Report and Recommendation and the action they believe the court should take with reference to the Report and Recommendation. Petitioner is allowed 20 days to file its brief. Respondent and intervenors are allowed until 20 days after the filing of petitioner's brief to file their briefs and the matter will be set for hearing as soon after filing of respondents' and intervenors' briefs as the business of this court will permit.

PER CURIAM.

Dated: April 17, 1961

Proof of Service

I, Harry J. Ockershausen, one of the attorneys for WHDH, Inc., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on May 2, 1963, I served a copy of the foregoing Reply Brief of Petitioner on The Solicitor General of the United States; Federal Communications Commission, Respondent herein; Massachusetts Bay Telecasters, Inc., Respondent herein; and Greater Boston Television Corporation, Respondent herein, by mailing copies, in duly addressed envelopes, with first class postage (or air mail postage, as indicated) prepaid, as follows:

To: The Honorable Archibald Cox
Solicitor General
Department of Justice
Washington 25, D. C.—first class postage

To: Max D. Paglin, Esq.
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